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ON BABIES AND BATHWATER: THE ARBITRATION FAIRNESS ACT AND THE SUPREME COURT'S RECENT ARBITRATION JURISPRUDENCE

Sarah Rudolph Cole[*]

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* Squire, Sanders & Dempsey Designated Professor of Law; Director, Program on Dispute Resolution, Moritz College of Law, Ohio State University. Thanks to Douglas R. Cole and Michael Z. Green for helpful insights and to Jennifer Herman, David Moritz, and Tyler Miller for research assistance.

I. INTRODUCTION

Several times during the last ten years, Democratic legislators proposed amendments to the Federal Arbitration Act (FAA) that would prohibit businesses from including predispute arbitration agreements in contracts involving employees.[1] The proposed amendments failed to gain traction. Over this same period, businesses continued to expand their use of arbitration agreements, particularly in their relationships with consumers.[2] The increased

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1. *See, e.g.*, H.R. 815, 107th Cong. (2001); H.R. 2282, 107th Cong. (2001); S. 2435, 107th Cong. (2002); H.R. 3809, 108th Cong. (2004); H.R. 2969, 109th Cong. (2005); H.R. 3010, 110th Cong. (2007); H.R. 5129, 110th Cong. (2008); S. 931, 111th Cong. (2009); H.R. 1873, 112th Cong. (2011). Although some of the early bills were responses to the use of arbitration to resolve statutory employment discrimination claims, drafters offered protection from arbitration to consumers as well. *See, e.g.*, Arbitration Fairness Act, H.R. 1873, S. 987, 112th Cong. (2011). In addition, legislators proposed amendments to various statutes, such as the Consumer Credit Protection Act, that would have had the same effect. *See, e.g.*, Consumer Fairness Act of 2003, H.R. 1887, 108th Cong. (2003). Almost none of these bills were reported out of committee, and those that survived the committee step of the legislative process were not voted on by the House or Senate. *But see* Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, 1394 (2010) (authorizing the Director of the newly formed Consumer Credit Protection Agency to prohibit or impose conditions or limitations on the use of arbitrations between a consumer and a financial services provider). The Dodd–Frank Act allows limitations on arbitration if the Director of the Consumer Credit Protection Agency determines, after conducting a formal study of the use of binding arbitration agreements in the financial services industry, that such limitations are in the public interest and for the protection of consumers. *Id.*

Professor Nancy Welsh described the Arbitration Fairness Act as "oft-introduced, oft-ignored." Nancy A. Welsh, *What is "(Im)Partial Enough" in a World of Embedded Neutrals?*, 52 ARIZ. L. REV. 395, 405 (2010).

2. *See* Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 886 (2008) (finding clauses providing for mandatory arbitration in 92.9% of employment contracts and 76.9% of consumer contracts); Linda J. Demaine & Deborah R. Hensler, *"Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience*, 67 LAW & CONTEMP. PROBS. 55, 62–64 (2004) (examining a different mix of industries and finding that 35.4% of consumer contracts contained an arbitration clause, with 69.2% of financial services contracts containing such a clause); Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 934–36 (1999) (discussing the expansion of arbitration into consumer agreements in relation to Supreme Court arbitration jurisprudence); Zachary Gima, Taylor Lincoln & David Arkush, *Forced Arbitration: Unfair and Everywhere*, PUB. CITIZEN, Sept. 14, 2009, at 1–2 (noting that 75% of the consumer industry companies who took part in their survey included mandatory arbitration clauses in contracts); EDWARD BRUNET ET AL., ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT 129–30 (2006) (discussing the expansion of arbitration agreements into every day consumer transactions with

use of consumer arbitration agreements, together with growing concern among the plaintiffs' bar and consumer advocates that these agreements unfairly disadvantage consumers, led to the reconfiguring of the legislation and its reintroduction in 2009, and again in 2011, as the Arbitration Fairness Act (AFA).[3] Unlike previous iterations of the legislation, which focused only on the impact of arbitration agreements on employees, these proposed AFA amendments to the FAA extend the moratorium on predispute arbitration agreements to consumers.[4]

This reintroduction comes at a good time for consumer advocates and the plaintiffs' bar. With adverse Supreme Court decisions and a Democratic president, successful adoption of the

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financial institutions, service providers, and sellers of goods); Lauren Gaffney, *The Circle of Assent: How "Agreement" Can Save Mandatory Arbitration in Long-Term Care Contracts*, 62 VAND. L. REV. 1017, 1024–25 (2009) (noting that mandatory arbitration of disputes have become the norm in nursing home contracts); Mark Furletti, *Mandatory Arbitration Clauses in the Credit Card Industry*, FED. RES. BANK PHILA., 4 (Jan. 2003), http://www.philadelphiafed.org/payment-cards-center/events/workshops/2003/MandatoryArbitrationClauses_012003.pdf (noting that mandatory arbitration clauses have been adopted by "almost every credit card issuer" in the United States); *Arbitration Clauses Prevalent: By Using Your Card, You May Be Giving Up Your Right to Settle Disputes in Court*, CONSUMER ACTION NEWS, Spring 2007, at 5 (finding that 75% of surveyed cards required consumers to settle disputes in arbitration).

3. H.R. 1873, S. 987, 112th Cong. (2011); S. 931, 111th Cong. (2009); *see, e.g.*, Jonathan G. Cedarbaum & David Montes, *Efforts to Curb Arbitration are Gaining Momentum*, COMPETITION LAW 360, at 1–2 (July 9, 2008), http://www.wilmerhale.com/files/Publication/2cd0f385-fba8-4b5e8272fbf922c49b50/Presentation/PublicationAttachment/58a08db6ab924369a3b7fc8b1082bebb/Efforts%20To%20Curb%20Arbitration%20Are%20Gaining%20Momentum.pdf.

4. H.R. 1020, 111th Cong. (2009). Although the 2009 AFA protected franchisees, in addition to consumers and employees, the 2011 AFA sponsors dropped the language protecting franchisees. *Compare* S. 931, 111th Cong. (2009) *with* H.R. 1873, 112th Cong. (2011). The AFA's introduction occurred even though the three major providers of consumer arbitration services have voluntarily adopted comprehensive rules designed to ensure that arbitration is fair to consumers. *See* AM. ARBITRATION ASS'N, CONSUMER DUE PROCESS PROTOCOL (2008), *available at* http://www.adr.org/sp.asp?id=22019 (providing extensive protections to ensure that consumers have access to information about arbitration, that consumers have an equal voice in selecting a neutral arbitrator, that fees are reasonable, and that the right to representation is ensured); JUDICIAL ARBITRATION & MEDIATION SERVS. (JAMS), CONSUMER MINIMUM STANDARDS (2009), *available at* http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Consumer_Min_Stds-2009.pdf (providing standards for consumer arbitrations including availability of all remedies at law, prohibitions on one-sided arbitration clauses that bind only the consumer, right to have the dispute heard in consumer's hometown, right to a written arbitrator decision, right of consumer to participate in choosing the arbitrator, reduced fees, and right to representation); NAT'L ARBITRATION FORUM, ARBITRATION BILL OF RIGHTS 3–10 (2007), *available at* http://www.adrforum.com/users/naf/resour ces/ArbitrationBillOfRights3.pdf (committing to adhere to a series of principles including preservation of remedies provided by law, reasonable fees, convenient hearings, reasonable discovery, access to information, and arbitrator neutrality).

AFA would appear more likely.[5] As in prior years, the legislation was proposed to address dissatisfaction with the arbitration process stemming from the increased use of arbitration agreements by businesses in their relationships with consumers and other parties who have little leverage when negotiating arbitration agreements.[6] Yet the draconian antiarbitration

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5. Although passage would seem *more* likely, the legislation's current focus on eliminating predispute arbitration agreements between one-shot and repeat players may well be too extreme to garner sufficient support for passage. Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449, 470 (1996) [hereinafter *Incentives & Arbitration*] (reporting the sharp divide among legislators over whether the Act should pass); Garen E. Dodge, *Ban on Mandatory Predispute Arbitration Again Proposed in Congress*, MARTINDALE.COM (May 27, 2011), http://www.martindale.com/civil-rights-law/article_Jackson-Lewis-LLP_1289464.htm. As of July 2011, the 2011 version of the bill has fourteen sponsors in the Senate and seventy-one sponsors in the House. *See Bill Summary & Status, S.987 Cosponsors*, THOMAS.GOV, http://thomas.loc.gov/cgi-bin/bdquery/z?d112:SN00987:@@@P (last visited Aug. 29, 2011); *Bill Summary & Status, H.R.1873 Cosponsors*, THOMAS.GOV, http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR01873:@@@P (last visited Aug. 29, 2011). Although the 2009 version of the bill had fifteen more sponsors in the House and six additional sponsors in the Senate when compared to the 2007 version, the bill nevertheless died in committee. *See Bill Summary & Status, H.R.1020 Cosponsors*, THOMAS.GOV, http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR01020:@@@P (last visited Aug. 29, 2011); *Bill Summary & Status, S. 931 Cosponsors*, THOMAS.GOV, http://thomas.loc.gov/cgi-bin/bdquery/z?d111:SN00931:@@@P (last visited Aug. 29, 2011). Previous versions of the bill also did not make it out of committee, despite popular expectation. *S. 931: Arbitration Fairness Act of 2009*, GOVTRACK.COM, http://www.govtrack.us/congress/bill.xpd?bill=s111-931 (last visited Aug. 24, 2011); *see* David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1250 (2009) (suggesting incorrectly that the passage of the 2009 AFA was a significant possibility). Wayne Outten, a plaintiff's attorney and arbitration critic, said, on a panel addressing the 2009 AFA, that the act had a "50-50 chance of passage." *CPR News*, 28 ALTERNATIVES TO HIGH COST LITIG. 122, 134 (2010); Michael W. Fox, *It's Not EFCA, Now It's FAN*, JOTTINGS BY AN EMPLOYER'S LAWYER (Apr. 24, 2009, 9:49 AM), http://employerslawyer.blogspot.com/2009_04_01_archive.html ("[O]dds are in favor of [the 2009 AFA's] passage."). *But see* Aditi Bagchi, *The Myth of Equality in the Employment Relation*, 2009 MICH. ST. L. REV. 579, 612 ("Even with a Democratic Congress and President, it seems unlikely that a bill that would so drastically alter the employment law landscape will actually become law in the near future.").

The recent Supreme Court decision *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010) changed some opinions. *See, e.g.*, Philip J. Loree, Jr., Stolt-Nielsen *Delivers a New FAA Rule—And then Federalizes the Law of Contracts*, 28 ALTERNATIVES TO HIGH COST LITIG. 121, 125 (2010) (stating that if the Supreme Court reverses the Ninth Circuit, as it went on to do, "this likely will increase the odds that the Fairness Act will be passed"); *Why the Supreme Court's Decision in* Rent-A-Center v. Jackson *Matters*, GSMLABORCOUNCIL.ORG (June 22, 2010, 12:33 PM), http://www.gsmlaborcouncil.org/node/5551 ("This decision will spur efforts in Congress to pass the Arbitration Fairness Act."); *USSCt: Arbitrator's Authority Over Claims of Unconscionability*, ALASKAEMPLOYMENTLAW.COM (June 28, 2010, 2:27 PM), http://www.akemplaw.com/wiki/2010/06/28/ussct-arbitrators-authority-over-claims-of-unconscionability/ ("It is possible that the result here may push Congress into taking action on the long-pending Arbitration Fairness Act.").

6. *See* Deepak Gupta, *New Poll: Americans Say "No Thanks" to Binding Arbitration*, CL&P BLOG (May 21, 2008), http://pubcit.typepad.com/clpblog/2008/05/new-poll-americ.html (noting that many Americans do not want binding arbitration

measure, inaptly named the "Arbitration Fairness Act," does not remedy arbitration's shortcomings, but instead eliminates predispute arbitration agreements between most repeat and one-shot players.[7] The AFA misses the mark primarily because it overstates the case against arbitration, rendering the legislation unpalatable to corporate and business interests, as well as many consumer and employee advocates.[8] Because corporate and other

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clauses or do not know about such clauses); Robert Berner & Brian Grow, *Banks vs. Consumers (Guess Who Wins)*, BUS. WK., June 16, 2008, at 72 (discussing allegations that National Arbitration Forum (NAF) consumer debt collection practices systematically favor credit card companies); Don Sniegowski, *Arbitration Fairness Act: Franchisees Pushing Congress to Pass Bill*, NUWIRE INVESTOR (May 11, 2009), http://www.nuwireinvestor.com/articles/arbitration-fairness-act-franchisees-pushing-congress-to-pass-bill-52946.aspx. A variety of articles online at *The Consumerist*—and from other news outlets—provide ample illustrations of the dissatisfaction with the arbitration process. *See, e.g.*, Alex Chasick, *Forced Arbitration: You Lose, Now Pay For Our Lunch*, THE CONSUMERIST (Apr. 28, 2009, 10:29 PM), http://consumerist.com/2009/04/forced-arbitration-you-lose-now-pay-for-our-lunch.html [hereinafter *Forced Arbitration*]; Alex Chasick, *"We Build in Middle Class Neighborhoods Because You Can't Afford to Fight Us"*, THE CONSUMERIST (Apr. 29, 2009, 10:22 PM), http://consumerist.com/2009/04/we-build-in-middle-class-neighborhoods-because-you-cant-afford-to-fight-us.html [hereinafter *We Build in Middle Class Neighborhoods*] (detailing consumer frustration with arbitration clauses in mortgage contracts); Carrick Mollencamp, Dionne Searcey & Nathan Koppel, *Turmoil in Arbitration Empire Upends Credit Card Disputes*, WALL ST. J., Oct. 15, 2009, at A14, *available at* http://online.wsj.com/article/SB125548128115183913.html ("[A] congressional subcommittee, which began an investigation last year to study the fairness of mandatory arbitration, concluded . . . that the current arbitration system is 'ripe for abuse' [and that] [a]rbitration 'as operated by NAF, does not provide protection for those consumers.'"); Robin Sidel & Amol Sharma, *Credit Card Disputes Tossed Into Disarray*, WALL ST. J., July 21, 2009, at A1 (reporting that the American Arbitration Association announced it will stop participating in consumer-debt-collection disputes until new guidelines are established).

7. *Incentives & Arbitration*, *supra* note 5, at 476; Dodge, *supra* note 5.

8. *See* Shirley M. Hufstedler & William H. Webster, *Arbitration Under Siege*, NAT'L L.J. (Sept. 20, 2010) (arguing that passage of the 2009 AFA would abolish arbitration as a viable option for many disputes); Letter from Int'l Inst. for Conflict Prevention and Resolution to Sen. Russell D. Feingold, Sen. Patrick J. Leahy, Rep. John Conyers, and Rep. Henry Johnson (Nov. 19, 2009), *available at* http://images.magnetmail.net/images/clients/IICPR/attach/ArbitrationFairnessActof2009Letter.pdf (highlighting the flaws in the AFA, including its elimination of the "benefits of arbitration in many categories of contracts"); John Allgood, *Will the Arbitration Fairness Act Survive the Midterm Election?*, BE NEUTRAL, http://www.digitalsmarttools.com/eGODR/Arbitration_Fairness_Act.htm (last visited Feb. 1, 2011) (calling for more empirical data to support the claims of the proponents of the AFA and citing two studies that dispute the idea of disparate outcomes in arbitration for consumers or employees); Press Release, U.S. Chamber of Commerce, Voters Strongly Back Arbitration, New Poll Shows (Apr. 2, 2008) (quoting Lisa Rickert, President of U.S. Chamber ILR, as saying that the AFA will eliminate arbitration and leave many consumers without recourse); Edna Sussman, *The Unintended Consequences of the Proposed Arbitration Fairness Act*, FED. LAW., May 2009, at 48, 50 (explaining that the AFA will result in too many disputes going to court); Lew Maltby, Model Arbitration Act (on file with author); RICHARD D. FINCHER, ET AL., ASS'N FOR CONFLICT RESOLUTION, AN EXAMINATION OF THE ARBITRATION FAIRNESS ACT OF 2009, *passim* (2009), *available at* http://www.acrnet.org/uploadedFiles/Publications/FinalReport%2012-1-09.pdf

interests are likely to be successful in opposing the bill in its current form, the real changes needed in arbitration, i.e., changes to permit consumers with low value claims to have their cases heard in some forum, will not occur.[9]

Perhaps not coincidentally, members of Congress proposed the AFA at a time when the Supreme Court's decisions repeatedly ensured the enforcement of the liberal federal policy favoring the use of arbitration as a dispute resolution

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[hereinafter ACR TASK FORCE REPORT] (criticizing the reach of the AFA's proposals).

9. Greg Beck, *Return of the Arbitration Fairness Act*, PUB. CITIZEN CONSUMER LAW & POLICY BLOG (Apr. 27, 2011, 6:54 PM), http://pubcit.typepad.com/2011/04/return-of-the-arbitration-fairness-act.html (claiming that the Arbitration Fairness Act of 2011 "has faced heavy opposition from business interests"). Some consumer relief may come through passage of the Dodd–Frank Act. *See* Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, 1394 (2010) (authorizing the Consumer Finance Protection Bureau (CFPB) to regulate arbitration agreements "for the protection of consumers"). This legislation governing the financial services industry takes a less radical approach to arbitration, enabling the newly established CFPB to study the use of arbitration and implement reform if the reform is in the public interest and for the protection of consumers. *Id.* ("[CFPB] shall conduct a study of . . . the use of agreements providing for arbitration of any future dispute between covered persons and consumers in connection with the offering or providing of consumer financial products or services.") Although the law authorizes the agency to ban or limit predispute arbitration agreements between consumers and covered financial providers for consumer finance products and services, it does not mandate the elimination of arbitration. *Id.* Additional provisions in the Dodd–Frank Act concerning residential mortgages and home equity lines of credit as well as in securities law disputes also do not eliminate arbitration as a dispute resolution option. Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 921(o) (2010) (to be codified at 15 U.S.C. § 78(o). In addition, incremental relief has come through the Franken Amendment, which bars defense contractors from requiring their employees to arbitrate Title VII discrimination claims, tort claims for sexual assault and harassment, wrongful imprisonment, and other similar claims. 48 C.F.R. § 222.7400–.7404 (2010). This Act may not provide much of an indication of Congress's views on predispute arbitration agreements, however, because the legislation was designed to address a particularly egregious situation in which a defense contractor stalled the arbitration of an employee who had sued the company for damages after she was raped and assaulted while working for the company. *See* John R. Parkinson, *Naked, Sore, Bruised, and Bleeding: Alleged U.S. Contractor Rape Victim Fights for Day in Court*, ABCNEWS.COM (Oct. 7, 2009), http://abcnews.go.com/Blotter/halliburton-employee-jamie-leigh-jones-testifies-senate-rape/story?id=8775641 (explaining the difficulties faced when the victim tried to bring her case to court); Jim Garrettson, *Franken Amendment Passes: GovCon Says Ouch*, GOVCONWIRE.COM (Feb. 17, 2010), http://www.govconwire.com/2010/02/franken-amendment-passes-govcon-says-ouch/ (pinpointing the Jamie Leigh Jones case as the "spur" of Franken's "legislative thrust"). Additional bans on predispute arbitration agreements have been proposed in foreclosure relief legislation and other mortgage-related legislation. *See* Joseph L. Barloon, Anand S. Raman & Darren M. Welch, *Consumer Protection Provisions in the Dodd–Frank Wall Street Reform and Consumer Protection Act*, SKADDEN.COM, http://www.skadden.com/newsletters/FSR_A_Consumer_Protection_Provisions_in_Dodd-Frank.pdf (last visited Aug. 17, 2011) (detailing the Dodd–Frank Act's Title X, which created the new Bureau of Consumer Financial Protection, and Title XIV, which prohibits abusive loan practices). It is unclear whether these incremental changes suggest an embrace of the greater changes the AFA proposes; it is more likely that these changes are based on particularly problematic factual situations that have captured public attention.

mechanism.[10] One recent decision abandoned almost thirty years of precedent to authorize parties to arbitrate unionized employees' statutory discrimination claims.[11] Another decision dealt a blow to consumers' ability to pursue their claims, precluding arbitrators from ordering parties to use class arbitration when the parties' arbitration agreement is silent on that issue.[12] A third decision, *Jackson v. Rent-a-Center West*, empowered parties to delegate greater responsibility to the arbitrator. In *Jackson*, the Court decided that the parties can delegate to the arbitrator, if they use clear and unmistakable language, the power to decide whether an arbitration agreement is unconscionable.[13] Finally, the Court appears to have placed the nail in the coffin on consumers' ability to pursue class processes when bound by an arbitration agreement in *AT&T v. Concepcion*.[14] In that case, the Court decided that the FAA preempts a court judgment that prohibits enforcement of class action waivers when agreed to by consumers with low value claims.[15] Taken together, these cases reinforce the Court's philosophy that parties' arbitration agreements are enforceable, and that, with few exceptions, parties should be able to structure arbitration as they see fit, including prohibitions on the use of class action procedures.

Why is there a disconnect between the judicial interpretation of the FAA and the legislative view of arbitration? A partial answer may be found in the ongoing public campaign against arbitration that Public Justice and Public Citizen, among others, are waging.[16] Despite substantial empirical evidence to

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10. *See, e.g.*, 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1461 (2009); *Jackson*, 130 S. Ct. at 2776 ("The FAA . . . requires courts to enforce [arbitration agreements] according to their terms."); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1773 (2010) (stating that the Supreme Court has "on numerous occasions" upheld the purpose of the FAA—ensuring that arbitration agreements are enforced according to the terms of the agreement) (citing Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478–79 (1989)); Hall St. Assocs., L.L.C., v. Mattel, Inc., 552 U.S. 576, 581 (2008).

11. *See Pyett*, 129 S. Ct. at 1464–69.

12. *See Stolt-Nielsen*, 130 S. Ct. at 1775. Some critics, as well as Justice Ginsburg, question whether this holding will extend to consumer arbitration. *Id.* at 1783 (Ginsburg, J., dissenting) ("Second, by observing that 'the parties [here] are sophisticated business entities,' and 'that it is customary for the shipper to choose the charter party that is used for a particular shipment,' the Court apparently spares from its affirmative-authorization requirement contracts of adhesion presented on a take-it-or-leave-it basis.").

13. *See Jackson*, 103 S. Ct. at 2775–77 (concluding that the arbitration agreement clearly stated that the arbitrator would have the authority to determine the unconscionability of the clause).

14. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2011).

15. *See id.* at 1744 (finding preemption when the claim was for $30.22).

16. *See Fair Arbitration*, ACCESS TO JUSTICE, PUB. CITIZEN (2011), http://www.citizen.org/Page.aspx?pid=2512; *Mandatory Arbitration*, PUB. JUSTICE (2011),

the contrary, groups like Public Citizen receive considerable press attention for anecdotal reports about unfair or expensive arbitration processes in which consumers have participated.[17] These reports garner legislative attention[18] and may, perhaps, have encouraged legislators to propose a poorly conceived answer to a longstanding question—how the Federal Arbitration Act should be amended to adapt to the modern use of arbitration.

What legislation is necessary to reform arbitration? While arbitration's critics attack the process on a variety of grounds, the most pressing issue in consumer arbitration, in the wake of recent Supreme Court decisions, is the lack of a viable forum for consumers with low value claims.[19] Wireless phone companies, banks, computer sellers, and cable companies routinely integrate arbitration agreements with class arbitration waivers in their boilerplate language in contracts with consumers.[20] For most

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http://www.publicjustice.net/Key-Issues-Cases/Access-To-Justice/Mandatory-Arbitration.aspx. Both sites contain links to various reports and stories that illustrate this point. *See also NACA's Arbitration Fairness Day is April 29*, MD. CONSUMER RIGHTS COAL. (Mar. 17, 2009, 8:25 AM), http://marylandconsumers.wordpress.com/2009/03/17/nacas-arbitration-fairness-day-is-april-29) (detailing NACA's Arbitration Fairness Day).

17. *Nonprofit Group Pans Arbitration*, HOUS. CHRON., May 20, 2002, at 3D; Jennifer Rose Hale, *U.S. Supreme Court Ruling Supports Credit Card Company Policies Requiring Arbitration*, FOX BUS. (Apr. 27, 2011, 4:30 PM), http://www.foxbusiness.com/personal-finance/2011/04/27/supreme-court-ruling-supports-credit-card-company-policies-requiring; James Vicini, *Supreme Court Rules for AT&T in Arbitration Case*, REUTERS (Arp. 27, 2011, 4:30 PM), http://www.reuters.com/article/2011/04/27/us-att-arbitration-idUSTRE73Q4N520110427; *see also We Build in Middle Class Neighborhoods*, *supra* note 6 (demonstrating that consumer protection groups and victims of unfair arbitration practices are actively reaching out to Congress).

18. *See, e.g.*, Press Release, Public Citizen, Congress Must Undo Damage of U.S. Supreme Court's Latest Anti-Consumer Decision: Statement of Public Citizen Attorney Deepak Gupta on the Introduction of the Arbitration Fairness Act (May 17, 2011), *available at* http://www.citizen.org/pressroomredirect.cfm?ID=3346.

19. *See* Darren P. Lindamood, *Redressing the Arbitration Process: An Alternative to the Arbitration Fairness Act of 2009*, 45 WAKE FOREST L. REV. 291, 310 (2010) (stating that preventing consumers from signing predispute arbitration agreements "will result in less access to a remedy for plaintiffs with small claims" and that "when employers or manufacturers are not bound by a predispute arbitration agreement, they can refuse to agree to arbitrate small claims with the knowledge that the high cost of litigation will prohibit the plaintiff from obtaining counsel.").

20. Verizon, Sprint, AT&T, and T-Mobile use class action waivers in their customer arbitration agreements. *See T-Mobile Terms & Conditions*, T-MOBILE.COM, http://www.t-mobile.com/Templates/Popup.aspx?PAsset=Ftr_Ftr_TermsAndConditions&print=true [hereinafter *T-Mobile Terms*] (setting the effective date at July 24, 2011); *Important Service/Product Specific Terms*, SPRINTPCS.COM, https://manage.sprintpcs.com/output/en_US/manage/MyPhoneandPlan/ChangePlans/popLegalTermsPrivacy.htm (last visited Aug. 17, 2011) [hereinafter *Sprint Terms*]; *Customer Agreement*, VERIZONWIRELESS.COM, http://www.verizonwireless.com/b2c/globalText?textName=CUSTOMER_AGREEMENT&jspName=footer/customerAgreement.jsp (last visited Aug. 17, 2010) [hereinafter *Verizon Agreement*]; AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1744 (2011) (describing AT&T Mobile's arbitration agreement); *Wireless Customer Agreement*, ATT.COM,

consumers, potential claims arising from such services involve relatively small amounts of money.[21] Were class actions available,[22] consumers with low value claims might be able to vindicate these kinds of complaints.[23] The consumer's acceptance of an arbitration agreement, however, precludes recourse to those forums (in most cases). Although arbitration services providers limited the costs to the consumer of participating in arbitration,[24]

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http://www.wireless.att.com/learn/articles-resources/wireless-terms.jsp (last visited Aug. 27, 2011) [hereinafter *AT&T Terms*]; *see also* Gima, Lincoln & Arkush, *supra* note 2, at 11, 14, 16 (showing that 71% of banks, 44% of computer manufacturers, and 46% of cable providers use arbitration clauses in their contracts); Stephen Landsman, *Nothing for Something? Denying Legal Assistance to Those Compelled to Participate in ADR Proceedings*, 37 FORDHAM URB. L.J. 273, 279 (2010) (discussing self-protective requirements in an unregulated market featuring adhesive conditions); Peter Rutledge, *Point: The Case Against the Arbitration Fairness Act*, DISP. RESOL. MAG., Fall 2009, at 4, 7 [hereinafter *Case Against AFA*] (arbitration's deprivation of consumers' ability to bring class actions is potentially problematic).

21. *Case Against AFA*, *supra* note 20, at 7 (calling for more empirical research to determine whether the adoption of class action waivers is as widespread as consumer advocates believe); *see also* Chang Sik Lim, *Analysis of Various Provisions in Cell-Phone Contracts*, FAIRCONTRACTS.ORG (July 5, 2010, 3:27 PM), http://faircontracts.org/content/analysis-various-cell-phone-contract-provisions-03-2010 (concluding that major wireless companies include mandatory arbitration clauses in their contracts in contemplation of their customers' small claims).

22. Some scholars suggest that a "small claims court carve out" would be an adequate remedy for this problem. *See* Alan Kaplinsky, *The Use of Pre-Dispute Arbitration Agreements by Consumer Financial Services Providers*, 1789 PLI/CORP 493, 516 (Apr. 2010). In deciding *AT&T v. Concepcion*, the Court may have offered some support for this position. While not specifically addressing the small claims court carve out AT&T provided, the Court nevertheless approved the AT&T arbitration provision as providing sufficient opportunity for the consumers to vindicate their claims either through bilateral arbitration or small claims court. *Concepcion*, 131 S. Ct. at 1753.

23. *See* Laster v. AT&T Mobility, LLC, 584 F.3d 849, 854–56 (9th Cir. 2009), *rev'd sub nom. Concepcion*, 131 S. Ct. at 1744 ("We held in *Shroyer* that a claim worth a few hundred dollars did not provide adequate incentive for a customer to bother pursuing individual arbitration. The $30.22 at issue here is even less of an incentive to file a claim. As a result, aggrieved customers will predictably not file claims—even if the odds are that after the letter-writing and arbitrator-choosing, they will get a $30.22 offer-thereby 'greatly reduc[ing] the aggregate liability' AT&T faces for allegedly mulcting small sums of money from many consumers." (citing Shroyer v. New Cingular Wireless Network Servs., Inc., 498 F.3d 976, 986 (9th Cir. 2007))). The Searle Civil Justice Institute study of consumer arbitration clauses, issued in 2009, found that 109 of the 299 arbitration clauses contained a class arbitration waiver. SEARLE CIVIL JUSTICE INST., CONSUMER ARBITRATION BEFORE THE AMERICAN ARBITRATION ASSOCIATION: PRELIMINARY REPORT 103 (2009), *available at* https://www.aryme.com/docs/adr/2-2-1235/informe-sealy-aaa-eeuu-2009-us-sealy-report-aaa.pdf. The study found that all cases involving cell phone companies (five out of five) and all credit card issuers' agreements (twenty-six out of twenty-six) contained class arbitration waivers. *Id.* In other areas, such as automobile sales and home builder contracts, the appearance of the waivers was closer to 50% or 60%. *Id.*

24. *See* Mark E. Budnitz, *The High Cost of Mandatory Consumer Arbitration*, 67 LAW & CONTEMP. PROBS. 133, 136–37 ("If a consumer's claim or counterclaim [under the AAA rules] is for less than $10,000, the consumer must pay half of the arbitrator's compensation, but the consumer's responsibility cannot exceed $125. . . . If the claim or counterclaim is for between $10,000 and $75,000, the consumer must pay one-half of the

consumers participating in arbitration continue to pay some filing fees and may also pay some portion of the arbitrator's fee.[25] As a result, access to a dispute resolution process may prove prohibitively expensive for consumers with relatively small claims. If the consumer has not signed an arbitration agreement, he or she might be able to find recourse in a class action process.[26] If bound by an arbitration agreement, however, until recently, a consumer might find solace in class action arbitration, which arbitrators often ordered if the parties did not place a class

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arbitrator's fee, but not more than $375. . . . [T]he fee is $2,250 for a claim between $75,000 and $150,000, and $4,000 for a claim between $150,001 and $300,000."); *id.* at 141 ("When a consumer files a claim under the JAMS rules, she must pay a flat fee of $125 and no more."); *id.* at 138–39 ("If a consumer files a claim [under the NAF rules] for between $5,000 and $10,000, she must pay a minimum of $185.00 unless the parties agree otherwise or applicable law requires a different cost allocation. For claims between $10,000 and $75,000, the cost to the consumer varies depending upon the specific amount of damages alleged."). *See Consumer Arbitration Costs*, AM. ARBITRATION ASS'N, http://www.adr.org/sp.asp?id=22039 (last visited Aug. 17, 2011) (stating that for claims under $10,000, consumer is responsible for half the arbitrator fees up to a maximum of $125, and for claims between $10,000 and $75,000, the consumer is responsible for half the arbitrator fees up to a maximum of $375; consumers are not responsible for administrative fees); *Consumer Arbitration Policy: Minimum Standards of Procedural Fairness*, JAMS, http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Consumer_Min_Stds-2009.pdf (last visited Aug. 17, 2011) (stating that $250 is the maximum fee to be paid by a consumer when the consumer initiates the arbitration, and that the corporation is to pay all arbitration fees when the corporation initiates the arbitration); NAT'L ARBITRATION FORUM, CODE OF PROCEDURE 10, 62–63 (2008) (stating that consumers who meet federal poverty standards need not pay arbitration fees, and providing procedure for consumers to request waiver of fees); NAT'L ARBITRATION FORUM, FEE SCHEDULE TO CODE OF PROCEDURE 3 (2008) (stating that a consumer claimant pays the filing fee and half the hearing fee up to a maximum of $250, and that a consumer-respondent pays half the hearing fee up to a maximum of $250); *Consumer Arbitration Fee Schedule*, U.S. ARBITRATION & MEDIATION MIDWEST, http://www.usam-midwest.com/images/ConsumerArbitrationFeeSchedule.pdf [hereinafter *USAM Fee Schedule*] (stating that the consumer must pay a $125 filing fee for claims less than $25,000 and $350 for claims equal to or greater than $25,000, as well as one half of all other costs and fees if the claim is greater than $75,000).

25. *See, e.g.*, *USAM Fee Schedule*, *supra* note 24. Interestingly, some businesses have drastically altered the standard arbitration fee structure so that consumers pay little or no fee. For example, AT&T Mobility (formerly Cingular Wireless), which provides cellular services to over 80 million subscribers, gives subscribers with a dispute the option of pursuing their claim in small claims court or arbitration. If the consumer chooses to file an arbitration claim, AT&T Mobility reimburses the $125 AAA consumer filing fee and pays all the costs of arbitration regardless of who wins. *See AT&T Terms*, *supra* note 20; *Sprint Terms*, *supra* note 20; *T-Mobile Terms*, *supra* note 20; *Verizon Agreement*, *supra* note 20.

26. *See* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1773–75 (2010) (explaining that if a party does not agree to an arbitration clause, they cannot be forced to adhere to the terms of one and they are therefore free to choose a different means of resolving their issues); Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004) (noting that consumers with small claims can benefit from class actions because "[t]he *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30").

arbitration waiver in their arbitration agreements.[27] The Supreme Court's recent decision in *AT&T v. Concepcion*, in which the Court held that the FAA preempts a state court decision mandating that an arbitration agreement is unconscionable if the consumer with a low value claim is not permitted to proceed in a class arbitration, sounds the death knell for the class arbitration process. Considered together with the Court's *Stolt-Nielsen* decision, where the Court held that in the absence of parties' explicit authorization of the use of class action arbitration, the arbitrators may not order it, the Court appears to have placed an insurmountable obstacle in the path of consumer efforts to vindicate low-value claims.[28]

With class action arbitration likely removed as an option for consumers with low value claims who are bound by arbitration agreements, the most pressing question in arbitration reform is what to do about consumers with small claims who cannot afford to bring those claims as individuals.[29] Rather than attempt to

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27. According to AAA's searchable class arbitration docket, as of July 2011, AAA is administering 307 class arbitration cases. *Searchable Class Arbitration Docket*, AM. ARBITRATION ASS'N, http://www.adr.org/sp.asp?id=25562 (last visited July 21, 2011).

28. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1710, 1753 (2011); *Stolt-Nielsen*, 130 S. Ct. at 1775. In at least one class arbitration case since *Stolt-Nielsen* was decided, the arbitrator still ordered class arbitration even though the arbitration clause did not directly address the issue. *See* Benson v. CSA-Credit Solutions of Am., Inc., No. 11-160-M-02281-08, at *3–6 (July 6, 2010) (Meyerson, Arb.) (on file with author) (finding that, despite contractual silence on the issue, the parties involved intended to submit to class arbitration).

29. One possible remedy for consumers is creating an exception to allow consumers bound by arbitration agreements to proceed in small claims court. *See infra* note 22; Amy J. Schmitz, *Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms*, 15 HARV. NEGOT. L. REV. 115, 117–18 (2010) (advocating that the "shoulds" of the 1998 Consumer Due Process Protocol, including a guarantee of consumer access to small claims court, be turned into legislative "musts"); Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *supra* note 2, at 890 (arguing that, because small claims court may be just as inexpensive as arbitration, it is not clear that policy should favor the arbitration of small-scale disputes).

As discussed previously, however, the small claims court option may prove inadequate. Class processes, unlike small claims court, create an incentive for consumers to bring the cause of action. *See* Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 28–31 (2000) (noting that class actions make possible "suits which otherwise would have been logistically or economically impossible"); Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 LAW & CONTEMP. PROBS. 75, 79–81 (2004); S.I. Strong, *The Sounds of Silence: Are U.S. Arbitrators Creating Internationally Enforceable Awards When Ordering Class Arbitration in Cases of Contractual Silence or Ambiguity?*, 30 MICH. J. INT'L L. 1017, 1050 (2009) (listing Judge Jack Weinstein's ten benefits of class actions, including: streamlining of the pretrial phase; judges' familiarization with the litigation; consistency of result for all injured parties; single action resolving the entire problem; providing plaintiffs with enough capital to fight on a level field with the defense; enhances the possibility of a global settlement; allows for a single, fair punitive damage amount;

eliminate arbitration in its entirety, a better approach, and one with greater likelihood of success in the legislative arena, would be to amend the FAA to permit class action arbitration, or, at the least, prohibit businesses from precluding class action arbitration or class actions in court through the use of a predispute arbitration agreement.[30] If the FAA were amended to address the real inequities in the arbitration process (i.e., the use of class action waivers), consumers as well as arbitration itself (as a dispute resolution mechanism) would benefit.[31]

This Article addresses the class action issue through the lens of recent Supreme Court jurisprudence. Before the Court decided *Concepcion* and *Stolt-Nielsen*, courts often disagreed about whether a consumer's waiver of the right to pursue class actions

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gives the court power to control fees; allows a single appellate panel to review the case; and permits small claims to be brought where they otherwise would not); David S. Evans, *Class Certification, the Merits, and Expert Evidence*, 11 GEO. MASON L. REV. 1, 4 (2002) (stating that the four major benefits of class actions include: a reduction of litigation costs, an increased deterrent effect, economization of judicial resources, and affording a convenient method for defendants to settle large numbers of related claims); Myron S. Greenberg & Megan A. Blazina, *What Mediators Need To Know About Class Actions: A Basic Primer*, 27 HAMLINE L. REV. 191, 207 (2004) (describing efficiency benefits of class actions). Some courts agree. *See, e.g.*, Muhammad v. Cnty. Bank of Rehoboth Beach, Del., 912 A.2d 88, 99–100 (N.J. 2006) (explaining that "rational" claimants forego their rights rather than pursue low-value claims); *In re* Am. Express Merchants' Litig., 554 F.3d 300, 320 (2d Cir. 2009) (holding that the class action waiver cannot be enforced and explaining that, in order to qualify as a class, the plaintiffs must show that the recovery by any one individual would be so low as to render bringing an individual action impracticable).

30. Why is the availability of class processes important? Professor Jean Sternlight contends:

> Many claims can be feasibly presented only by a class rather than on an individual basis, despite the fact that some courts continue to enforce arbitration and deny class actions in such impractical situations. Where plaintiffs can establish that the prohibition on class actions would deprive them of any forum in which to present their federal statutory claim by making that lawsuit economically unfeasible, courts should refuse to enforce such a provision—either by voiding the arbitration clause altogether, by holding the arbitration clause inapplicable as to class claims, or by permitting plaintiffs to present their claims in an arbitral class action.

Sternlight, *supra* note 29, at 103.

31. Studies reveal that consumer arbitration is a process that benefits both businesses and consumers. *See* Peter B. Rutledge, *Whither Arbitration?*, 6 GEO. J.L. & PUB. POL'Y 549, 556–60 (2008) (reviewing empirical data suggesting that win rates and perceived fairness in consumer arbitration are comparable to or better than in litigation); SEARLE CIVIL JUSTICE INST., *supra* note 23, at 6–16 (reviewing empirical data suggesting that consumer arbitration is faster and cheaper than litigation with comparable win rates, and that there is a lack of evidence for repeat-player bias); Sarah R. Cole & Kristen M. Blankley, *Empirical Research on Consumer Arbitration: What the Data Reveals*, 113 PENN ST. L. REV. 1051, 1062–70 (2009) (reviewing data from NAF consumer collections cases and finding that arbitration frequently resulted in financial breaks for consumers, that most consumers paid few or no fees in arbitration, and that the cases are generally resolved quickly in arbitration).

in court or arbitration was unconscionable.[32] Following these two cases, however, one would expect to see businesses altering their agreements with consumers so that a class action arbitration waiver is included. Under *Stolt-Nielsen*, arbitrators may not order class arbitration based on an agreement that is silent with respect to class arbitration.[33] Under *Concepcion*, a court will be unable to hold that a class arbitration waiver is unconscionable (unless other aspects of the arbitration process are unconscionable).[34] Following *Jackson*, one would expect to see those same businesses rewriting their arbitration agreements to delegate to the arbitrator decisions about whether an agreement to arbitrate is unconscionable. Although businesses have no guarantee that an arbitrator will reject unconscionability challenges more easily than would a court, one suspects that an arbitrator, who wants to arbitrate and earns a salary from arbitration, will be more inclined to find an arbitration agreement enforceable than would a court. These cases, considered together, show strong judicial support for arbitration but, at the same time, an anti-class arbitration sentiment. As a result, the class action waiver issue needs legislative attention so that consumer arbitration may truly become a useful and beneficial alternative dispute resolution process.[35] If Congress could address this issue effectively, the major problem associated with consumer arbitration would be resolved.

II. CONSUMER ARBITRATION

Although critics lambast consumer arbitration as unfair to consumers, numerous empirical studies of arbitration demonstrate that consumer arbitration agreements typically provide consumers with fair and affordable access to justice.[36]

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32. *See* Discover Bank v. Superior Court, 113 P.3d 1100, 1108–09 (Cal. 2005) (agreeing that class action waivers can be unconscionable while noting that other courts disagree).

33. *See* Stolt-Nielsen, 130 S. Ct., at 1775–76.

34. *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1746–47, 1753 (2011) (holding that a court must look outside the class arbitration waiver to find the agreement unconscionable).

35. As Professor Rutledge notes, addressing the class action waiver issue is "a more calibrated solution" than a wholesale ban on predispute arbitration agreements. *Case Against AFA*, *supra* note 20, at 7.

36. *See* Bradley Dillon-Coffman, *Revising the Revision: Procedural Alternatives to the Arbitration Fairness Act*, 57 UCLA L. REV. 1095, 1107–08 (2010) (noting that monetary relief is slightly higher for individuals in arbitration, and 93% of consumers using arbitration find it to be fair) (citing NAT'L ARBITRATION FORUM, THE CASE FOR PRE-DISPUTE ARBITRATION AGREEMENTS 2 (2004)); Erik J. Moglinicki & Kirk D. Jensen, *Arbitration and Unconscionability*, 19 GA. ST. U. L. REV. 761, 766 (2003) ("Consumer

The absence of consumer arbitration, which would shift these claims into traditional court processes,[37] would effectively eliminate many of these claims because the litigation process is expensive and difficult to navigate without representation. In one area, though, consumer arbitration agreements appear to preclude access to justice rather than enable it. Contractual provisions banning class actions or class action arbitration effectively foreclose the prosecution of individual claims of low value.[38] Thus, an arbitration provision tends to be the end of the road for a consumer with a low value dispute. That businesses implement arbitration agreements with class action waivers for the primary purpose of preventing class claims offers further support for the argument that Congress should eradicate this aspect of arbitration agreements.[39]

Because class action waivers prevent many consumers from pursuing their claims, and because courts often enforce these waivers, legislation addressing the class action waiver issue is necessary. This Section will review the current state of empirical evidence on consumer arbitration and then focus on the impact of consumer arbitration agreements on the availability of class action procedures, whether in litigation or arbitration. Ultimately, this Section will conclude that the primary objection

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advocates . . . have noted that arbitration provides a fast, fair, and affordable alternative to litigation."); Richard L. Hurford, *The Business Case for SMART Dispute Resolution Processes*, MICH. B.J., June 2010, at 42, 44 (stating that despite the pending AFA, arbitration processes, "if appropriately designed, have been demonstrated to be a faster, less expensive, and fair method of resolving employment disputes").

37. *Case Against AFA*, *supra* note 20, at 7.

38. *See* JOHN O'DONNELL, PUB. CITIZEN, THE ARBITRATION TRAP: HOW CREDIT CARD COMPANIES ENSNARE CONSUMERS 43 (2007), *available at* http://www.citizen.org/documents/ArbitrationTrap.pdf (discussing how consumers might not pursue their low-value complaints outside of class action settings because attorneys probably will not take their cases).

39. Even without empirical studies, there is a general sense that businesses utilize consumer arbitration agreements to avoid class processes. In discussing businesses' motivations for adopting these clauses as well as the benefits of class processes, Professor David S. Schwartz has noted that:

> [A]rbitration may also displace class actions. By aggregating low-cost/low-stakes or high-cost/low-stakes cases into a single high-cost/high-stakes case, class actions can realize potential process-cost economies of scale that make them a relatively inexpensive forum for the class members—both in terms of monetary and information costs. Defendants' aggressive efforts to use mandatory arbitration clauses as an escape from class actions provide a strong signal that their primary concern is to deter claims, not to ensure that all claims against them are aired more cheaply. While there is no doubt disagreement among some mandatory arbitration supporters about whether class actions are arbitrable—and the law remains unsettled—it is clear that at least some find the possibility of getting rid of class actions as the primary virtue of mandatory arbitration.

Schwartz, *supra* note 5, at 1319–20.

to consumer arbitration agreements is not that they fail to provide justice to most consumers, but that these clauses preclude access to justice for those consumers, typically with low-value claims, who would only be able to pursue their claim if they join with other consumers.

A. *The Current State of Consumer Arbitration*

The increased use of consumer arbitration in non-negotiated agreements precipitated a call for empirical analysis of the costs and benefits of consumer arbitration as an alternate means for resolving disputes.[40] The working assumption of many antiarbitration advocates was that a business-promulgated dispute resolution clause must, by its very nature, be harmful to consumers.[41] Initially, empirical research seemed to bolster this assumption.

In 2007, Public Citizen, a national non-profit consumer advocacy group, issued a scathing report attacking the consumer arbitration process.[42] The Public Citizen report appeared to provide evidence that arbitration is unfair to consumers.[43] Academics and arbitral organizations responded quickly, providing arguments and statistics suggesting significant difficulties with Public Citizen's analysis of the available empirical evidence.[44] Ultimately, review of the empirical evidence revealed that Public Citizen's (and others') claims that consumer arbitration is inherently unfair to consumers were overstated.[45]

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40. *See* Paul B. Marrow, *Determining If Mandatory Arbitration Is "Fair": Asymmetrically Held Information and the Role of Mandatory Arbitration in Modulating Uninsurable Contract Risks*, 54 N.Y.L. SCH. L. REV. 187, 210, 212, 216 (2010); O'DONNELL, *supra* note 38, at 13, 58–59 (discussing the rise in the use of binding mandatory arbitration clauses in the late 1990's and then proceeding to analyze consumer data).

41. *See, e.g.*, Gima, Lincoln & Arkush, *supra* note 2, at 4 (calling for Congress to ban arbitration clauses in consumer contracts because forced arbitration creates a "systematic bias in favor of businesses").

42. O'DONNELL, *supra* note 38, at 13–15, 28–30, 43 (describing arbitration as a secret process that is severely skewed in favor of corporations).

43. *Id.* at 28–30, 32, 39.

44. *See, e.g.*, PETER B. RUTLEDGE, U.S. CHAMBER INST. FOR LEGAL REFORM, ARBITRATION—A GOOD DEAL FOR CONSUMERS: A RESPONSE TO PUBLIC CITIZEN 10–12 (2008) (criticizing Public Citizen's data, methodology, and conclusions); *Case Against AFA*, *supra* note 20, at 4, 7; *Bogus Attack on Arbitration Really about Plaintiffs' Lawyers' Right to Sue*, INST. FOR LEGAL REFORM (Sept. 27, 2007), http://www.instituteforlegalreform.com/component/ilr_media/30/pressrelease/2009/384.html (arguing that arbitration really gives American consumers an effective and cheap recourse to address their grievances); Walter Olson, *Behind Those "Unfair" Arbitration Numbers*, OVERLAWYERED BLOG (Oct. 18, 2007), http://www.overlawyered.com/2007/10/behind-those-unfair-arbitratio.html (arguing that Public Citizen's claims are inaccurate and misleading).

45. Cole & Blankley, *supra* note 31, at 1052.

But the Public Citizen Report generated interest in conducting better empirical research of the consumer arbitration process. Subsequent studies of consumer arbitration concluded that, in the vast majority of consumer arbitrations, consumers pay fewer fees than they would in court, obtain results faster than they would in court, and win greater relief than they would likely win in court.[46] Although more empirical research would obviously shed additional light on the issue, the evidence from the research available does not support the promulgation of the Arbitration Fairness Act as currently written.[47] Rather, it supports a narrow tailoring of the AFA to address specific concerns, such as the increased use of class action waivers.[48] This section briefly examines studies conducted following the issuance of the Public Citizen Report to determine what evidence is available from which subsequent assumptions can be made.

Cole and Blankley examined the same data set Public Citizen used for its report but arrived at considerably different conclusions than Public Citizen. Both studies evaluated the 34,000 NAF-administered California arbitration cases.[49] Examination of the data uncovered that well over 99% of the data set were collections cases, in which the consumer was the defendant.[50] Thus, from the authors' perspective, the NAF data

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46. *See, e.g., id.* at 1067, 1070–73 (finding that arbitration cases are typically shorter in duration when compared to similar cases in California federal court and that "[c]onsumers [p]ay [f]ew or [n]o [f]ees" in reported NAF arbitrations); RUTLEDGE, *supra* note 44, at 6–9.

47. *See Case Against AFA*, *supra* note 20, at 4 (explaining that data shows that consumers are better off under a system with enforceable pre-arbitration agreements).

48. *See* Amy Schmitz, *Regulation Rash? Questioning the AFA's Approach for Protecting Arbitration Fairness* 28–29 (Univ. of Colo. Law Sch. Legal Studies Research Paper Series, Working Paper No. 10-02, 2010) (arguing that while further research is necessary, class waivers ought to be legislatively precluded); *Case Against AFA*, *supra* note 20, at 7 (arguing that a "more calibrated solution" would be to eliminate class arbitration waivers).

49. Cole & Blankley, *supra* note 31, at 1062–67 (finding that the Public Citizen Report "draws the wrong conclusions from too little information"); O'DONNELL, *supra* note 38, at 13–15.

50. All but 15 of these cases were designated "collections" cases. Cole & Blankley, *supra* note 31, at 1063 n.65. Collections cases are unlike other consumer cases. In a collections case, the consumer is the defendant. Typically, there is no question that the consumer owes the debt to the credit card issuer. RUTLEDGE, *supra* note 44, at 10–11. In mediation, the consumer admits the debt and then typically works out a payment plan with the issuer. Sarah Rudolph Cole & Theodore H. Frank, *The Current State of Consumer Arbitration*, DISP. RESOL. MAG., Fall 2008, at 31; RICHARD M. CALKINS & FRED LANE, MEDIATION PRACTICE GUIDE 6–10 (2008). In arbitration, though, the debtor will likely lose, because he owes the debt. RUTLEDGE, *supra* note 44, at 10–11. In such situations, all an arbitrator can do is enter an award against the debtor. Marrow, *supra*

set was of limited value. It was useful primarily for drawing conclusions about collections cases, not the consumer-initiated arbitration cases that raise concerns among antiarbitration advocates.

Although the data set is of little use as a critique of the consumer-initiated arbitration process, some of our findings were interesting—at least as they related to issues of consumer fees and awards. The data showed that the vast majority of the cases involved attempted collection of debt from a consumer (and thus were initiated by a business).[51] In these arbitrations, most consumers paid few or no fees.[52] In all but five of the approximately 34,000 cases, the consumer paid under (and usually well under) $500 in arbitration fees.[53] In fact, the data showed that in 99.6% of the cases, the consumer paid no fee at all.[54] In addition, the data revealed that arbitration cases reached conclusion much more quickly than did similar claims filed in court.[55]

Unfortunately, because Public Citizen studied primarily collections cases, its study, and our subsequent analysis of it, reveal little about consumer-initiated arbitration claims. Fortunately, other studies of consumer arbitration examine consumer-initiated arbitration and provide helpful information in assessing the appropriateness of arbitration as a dispute resolution mechanism for consumer disputes.

In 2004, for example, Ernst & Young published a study about consumer arbitration.[56] The results of this report suggest that consumers fare extremely well in consumer-initiated arbitration, prevailing in 55% of cases that reach decision and "obtaining favorable results" in close to 80% of the cases reviewed.[57] In addition, the report contained the results of a

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note 40, at 219–20. Thus, the win-loss record for consumers in these cases is not cause for concern. Moreover, it mirrors consumer success in court collection cases. Hillard M. Sterling & Philip G. Schrag, *Default Judgments Against Consumers: Has the System Failed?*, 67 DENV. U. L. REV. 357, 360–61, 369 (1990) (finding consumers prevailed in Small Claims and Conciliation Branch of the Superior Court of the District of Columbia only 4% of the time, with the vast majority of cases being default judgments)

51. Cole & Blankley, *supra* note 31, at 1062–63.

52. *Id.* at 1067.

53. *Id.*

54. *Id.*

55. *Id.* at 1072–73.

56. ERNST & YOUNG, OUTCOMES OF ARBITRATION: AN EMPIRICAL STUDY OF CONSUMER LENDING CASES (2004). Public Citizen criticized Ernst & Young's report, primarily because of its small sample size (226 respondents) and the representativeness of the sample studied (limited to consumer-claimants). O'DONNELL, *supra* note 38, at 20.

57. ERNST & YOUNG, *supra* note 56, at 2, 9–10. These statistics include cases where the parties reached a settlement satisfactory to the consumer or the case was dismissed at the

telephone survey of twenty-six of the participants. The telephone survey found that 69% of the respondents indicated that they were satisfied or very satisfied with the process.[58]

In 2006, Mark Fellows wrote an article in which, among other things, he analyzed California's consumer arbitration data.[59] Fellows's analysis of the data revealed that consumers prevailed in 65.5% of consumer-initiated cases that reached decision.[60] By contrast, consumer plaintiffs litigating contract claims in the seventy-five largest American counties prevailed only 61.5% of the time overall, and 60.9% of the time in bench trials.[61] Businesses prevailed in 77.7% of business-initiated arbitration cases that reached decision.[62] By contrast, business plaintiffs litigating contract claims in the seventy-five largest American counties prevailed 76.8% of the time overall, and 78.9% of the time in bench trial cases.[63]

Fellows further stated that case duration in arbitration is shorter than in litigation. Consumer claims against businesses typically lasted 4.35 months in arbitration and 19.4 months in litigation.[64] For business-initiated claims, the figures were 5.60 and 15 months, respectively.[65] In addition, for claims consumers brought against businesses, businesses paid an average arbitration fee of $149.50; for claims businesses initiated, consumers paid an average arbitration fee of $46.63.[66] This is consistent with findings that consumers typically do not pay large arbitration fees.

Although similarly small, AAA's study of 310 AAA consumer cases awarded between January and August 2007,[67] offers further support for the theory that consumers often achieve

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consumer's request. 125 of the 129 cases settled or dismissed prior to arbitration are listed as "consumer prevailed." *Id.* at 9.

58. *Id.* at 11.

59. Mark Fellows, *The Same Result as in Court, More Efficiently: Comparing Arbitration and Court Litigation Outcomes*, METRO. CORP. COUNS., July 2006, at 32. California legislation requires arbitration providers to disclose information about consumer arbitrations. *See* CAL. CIV. PROC. CODE § 1281.96(a) (West 2007) (requiring that private arbitration companies provide quarterly publication of consumer arbitration information on their websites in a computer searchable format).

60. Fellows, *supra* note 59.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. The AAA's study examined noncollections cases. *Analysis of the American Arbitration Association's Consumer Arbitration Caseload*, AM. ARBITRATION ASS'N, http://www.adr.org/si.asp?id=5027 (last visited Sept. 9, 2011).

positive results in arbitration. In that study, AAA noted that consumers prevail in 48% of cases in which they are the claimant.[68] By contrast, businesses prevail in 74% of cases in which they are the claimant.[69] Following that study, the Searle Civil Justice Institute examined 301 AAA-administered consumer arbitrations closed by an award between April and December 2007.[70] The Searle Institute found that consumers in these arbitrations paid minimal administrative fees. For example, in cases with claims of less than $10,000, consumer claimants paid an average fee of $96;[71] in cases where the consumer's claim was between $10,000 and $75,000, the fee increased to $219.[72] Arbitration also proved to be a speedy dispute resolution process. The Searle Institute found that the average time from filing to final award was 6.9 months.[73] This finding is consistent with Cole and Blankley's analysis of the 34,000 NAF-administered cases. In that study, Cole and Blankley found that a majority of arbitration cases are settled within 200 days, or in under seven months.[74] Similarly, cases that went to hearing were also resolved, on average, in less than seven months.[75] By contrast, the average length of time from filing to trial in the federal district courts of California during that period was over two years.[76]

Consumers in the AAA arbitrations also experienced success in their filings, winning relief in 53.3% of the cases filed and receiving an average of $19,255.[77] Arbitrators were also quite willing to award attorney's fees to consumer claimants who sought fees, awarding fees to claimants in 63.1% of the cases.[78] Finally, the study did not find a statistically significant repeat player effect—consumers won some relief in 51.8% of cases against repeat businesses (i.e., businesses who appear more than once in the AAA dataset).[79]

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68. *Id.*

69. *Id.*

70. SEARLE CIVIL JUSTICE INST., *supra* note 23, at 37.

71. Only $1 of those fees were administrative; the other $95 were arbitrators' fees. *Id.* at 57.

72. *Id.* (explaining that $204 in arbitrator fees plus $15 in administrative fees make up $219 total).

73. *Id.* at 63.

74. Cole & Blankley, *supra* note 31, at 1071.

75. *Id.* at 1072.

76. *Id.* at 1073.

77. SEARLE CIVIL JUSTICE INST., *supra* note 23, at 67–69.

78. *Id.* at 71.

79. *Id.* at 76.

In addition, the study considered whether arbitration procedures were fair to consumers, using the question whether the parties complied with the Consumer Due Process Protocol to address this issue.[80] The study found that a substantial majority of consumer arbitration clauses comply with the due process protocol at the time the claim is filed, and that AAA refused to administer the case if the clause did not comply.[81] AAA also independently conducted a protocol compliance review of arbitration clauses appearing in filed claims.[82] As a result of this review, some businesses modified their arbitration clauses to ensure consistency with the due process protocol.

The Searle Institute identified potential limitations of its study—e.g., its small dataset and that all of the cases were administered by AAA—but nevertheless concluded that consumer arbitration appears speedier and less costly for consumers than critics have alleged and that the repeat player effect appears to be minimal, or non-existent, in most cases.[83]

While the data available is surely incomplete, it nevertheless suggests that elimination of consumer arbitration at the present time, as the AFA mandates, would be unwise. If consumers can save money while achieving results similar to or better than they would in court, it would seem counterintuitive to bar them from agreeing to do so. Rather than impeding consumer access to justice, any new legislation should facilitate access and focus on improving arbitration as a process for vindicating rights.[84] As Professor Rutledge notes, some AFA advocates argue that the AFA in its current form is necessary so that consumers may bring class actions.[85] While the evidence available on that issue, discussed in the next section, reveals a very different picture than does the evidence on consumer arbitration generally, an AFA that bans consumer arbitration entirely is unnecessary to solve the problem class action waivers create.[86]

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80. The Consumer Due Process Protocol sets fairness standards to govern consumer arbitration. AM. ARBITRATION ASS'N, *supra* note 4. The Protocol, among other things, ensures an arbitration process that is accessible, reasonable in terms of cost and location, and overseen by competent, unbiased neutrals. *Id.* at Principals 2–4, 6–7.

81. SEARLE CIVIL JUSTICE INST., *supra* note 23, at 84, 93.

82. *Id.* at 83–87 ("AAA does not review clauses for protocol compliance in cases seeking more than $75,000.").

83. *Id.* at xiii–xiv.

84. *Case Against AFA*, *supra* note 20, at 4 ("[E]liminating predispute arbitration agreements impedes rather than improves an individual's access to justice.").

85. *Id.* at 7.

86. SEARLE CIVIL JUSTICE INST., *supra* note 23, at 26, 63, 68 (stating that consumer fees ranged from $125 to half of the arbitrator's compensation if the claim was for greater than $75,000, the median time from filing to award was 168 days, and the average

B. *Business Implementations of Class Action and Class Arbitration Waivers*[87]

Although the available empirical evidence establishes that consumer arbitration may provide more benefit to consumers with significant individual claims than would litigation, the evidence also shows that the primary reason many companies implement arbitration provisions is to avoid class action procedures.[88] While it is not surprising that companies would prefer to avoid class procedures, the effect of these clauses, which ultimately preclude individuals from vindicating low-value claims either in the judicial or arbitral fora, is troubling. Although arbitration can be an efficient, speedy, low-cost dispute resolution mechanism, the existence of this alternate forum should not be used to deny parties the ability to have their case heard in some venue. While numerous policy groups and academics have expressed concern regarding this issue, until the Supreme Court's recent decisions in *Concepcion* and *Stolt-Nielsen*, the impetus for radical change was not present.[89]

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consumer claimant was awarded 52.1% of what they claimed); Cole & Blankley, *supra* note 31, at 1067–70 (explaining that NAF data indicates that most consumers paid few or no fees, spent roughly the same or less time as they would have in court, and did not have to pay the full amount claimed by the business); RUTLEDGE, *supra* note 44, at 22–24 (arguing that arbitration is often less expensive, and even when it is not, existing mechanisms adequately regulate the burden borne by the individual).

87. Critics attack lack of arbitrator disclosure, limited discovery, limited judicial review, and other factors as problematic. *See Federal Arbitration Act: Is the Credit Card Industry Using It to Quash Legal Claims?: Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary*, 111th Cong. 99–100 (2009) (testimony of Richard H. Frankel, Esquire, Earl Mack School of Law, Drexel University) (stating that because arbitration is private and the arbitrators do not provide written opinions, the decisions fail to create binding precedent and allow the arbitrators to make "wacky or silly" rulings that will not be overturned); Demaine & Hensler, *supra* note 2, at 68, 72–73 (examining the limitations on discovery in consumer agreements and concluding that businesses have an advantage in arbitration discovery). Yet problems other than the class processes bans are less significant—in part because the empirical research establishes that, for most consumers, arbitration provides a fair process for adjudication of their claims. SEARLE CIVIL JUSTICE INST., *supra* note 23, at 6–16 (explaining that consumer arbitration is, for the most part, as fair, if not fairer, than litigation). Moreover, creation of documents like the Consumer Due Process Protocol, which major arbitral providers adopted, ameliorates the impact of some of these other issues. AM. ARBITRATION ASS'N, *supra* note 4; JAMS, POLICY ON EMPLOYMENT ARBITRATION MINIMUM STANDARDS 5 (2009). Finally, companies appear to be modifying their arbitration agreements (and arbitral providers modifying their cost structures) to address procedural problems. SEARLE CIVIL JUSTICE INST., *supra* note 23, at xiv. ("In response to AAA review, more than 150 businesses have either waived problematic provisions on an ongoing basis or revised arbitration clauses to remove provisions that violated the Consumer Due Process Protocol.").

88. Eisenberg, Miller & Sherwin, *supra* note 2, at 887–88.

89. *See More on* Stolt-Nielsen v. AnimalFeeds, ADR PROF BLOG (Apr. 29, 2010) http://www.indisputably.org/?p=1284 (citing to Paul Kirgis's letter) (arguing that *Stolt-Nielsen*'s holding allows companies to "check a box to exempt themselves from

With the likely elimination of class action arbitration as an alternative to arbitration for a party with a low-value claim, numerous individuals will be unable to vindicate their claims in any venue.

Empirical studies of consumer arbitration agreements establish that businesses, particularly credit card and cell phone companies, implement arbitration agreements in order to avoid either class action or class arbitration processes.[90] Other industries also utilize predispute arbitration agreements in their contracts with consumers, but to varying lesser degrees.[91] Whatever the underlying motivation, the evidence shows that many industries systematically avoid class procedures through the implementation of consumer arbitration agreements.

In 2008, Theodore Eisenberg, Geoffrey Miller, and Emily Sherwin published a study whose data suggests that businesses use arbitration agreements in consumer contracts frequently and for the primary purpose of avoiding class processes rather than, as is often claimed, for the purpose of promoting fair and efficient dispute resolution.[92] The authors reviewed almost 200 consumer and nonconsumer contracts from 21 corporations in a variety of businesses (including wireless, banking, and cable services).[93] Seventy-five percent of the consumer contracts contained an arbitration clause.[94] Each and every one of these arbitration clauses included a class arbitration waiver.[95] Based on this data,

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class actions"); Bill Mears, *Court Rules for Company in Dispute Over Taxes on 'Free' Cell Phone*, CNN.COM (Apr. 26, 2011), http://www.cnn.com/2011/US/04/27/scotus.class.action.arbitration/index.html?iref=allsearch (reporting that consumer groups were disappointed in the *Concepcion* ruling because they did not think the Federal Arbitration Act was "hostile to class actions").

90. Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 LAW & CONTEMP. PROBS. 75 (2004); Eisenberg, Miller & Sherwin, *supra* note 2, at 882–84 (reporting that the overwhelming majority of businesses in their study included mandatory arbitration agreements and that most of those agreements contained class action waivers); Kaplinsky, *supra* note 22, at 505 ("[A]ll major credit card issuers [are using arbitration], e.g., Citibank, Chase, AMEX, Discover Card, Capital One, GE Capital. Bank of America recently announced that it will no longer seek to arbitrate consumer disputes. However, it will continue to use and seek to enforce class action waivers.").

91. *See* Demaine & Hensler, *supra* note 2, at 63–64 (reporting that arbitration clauses are used by approximately one third or fewer of the companies in the housing and home services, retail services, health care, food and entertainment, and travel industries).

92. Eisenberg, Miller & Sherwin, *supra* note 2, at 886–88.

93. *Id.* at 881–82.

94. *Id.* at 882–83.

95. *Id.* at 884. Professor Eisenberg noted that 60% of the consumer contracts that contained arbitration clauses also contained provisions that these clauses would be void if the arbitration process permitted class wide activity. *Id.* at 884–85. Eisenberg also noted

Professor Eisenberg and his co-authors concluded that businesses use consumer arbitration clauses as a means to avoid "aggregate dispute resolution."[96] The "strategic advantage" businesses obtain through use of these clauses is the avoidance or the decreased threat of class actions.[97]

A subsequent study of Eisenberg's data clarified rather than debunked Eisenberg's conclusions. According to Professors Chris Drahozal and Stephen Ware, Eisenberg's conclusions should be limited to use of arbitration clauses in credit card and cell phone contracts and cannot necessarily be expanded to other businesses' use of arbitration clauses.[98] Reviewing data from the Searle Civil Justice Institute's Consumer Arbitration Task Force Report, Drahozal and Ware found that while use of class arbitration waivers was common in cell phone company and credit card contracts, waivers were less frequently used by automobile dealers, casualty insurers, home builders, and real estate brokers.[99] According to the Searle data, auto dealers use class action waivers about 50% of the time and home builders use them about 65% of the time; but casualty insurers and real estate brokers never use them and mobile home dealers rarely use them.[100] The authors also noted that even with credit card and consumer finance companies, the businesses may use arbitration not only to avoid class actions but also in order to collect bad debts.[101]

The most recent empirical research on this issue offers additional support for Eisenberg et al.'s findings that companies

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that waivers of class wide arbitration, provisions voiding the arbitration agreement if class wide activity is ordered, and waivers of class action litigation are more frequent in consumer than in business-to-business and employment contracts. *Id.* at 884.

96. *Id.* at 888.

97. *Id.* at 895–96. The authors viewed the use of arbitration clauses as "strategic" because they found that businesses use arbitration clauses against consumers but less frequently against each other. *Id.* The use of arbitration in consumer contracts, rather than in contracts involving other businesses, suggests that businesses' claims that they use arbitration with consumers to promote efficiency and fairness, are pretextual. If fairness and efficiency were the goals, why not use arbitration in business-to-business contracts as well? In their subsequent study, Professors Drahozal and Ware cast doubt on this conclusion. *See* Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433, 457–67, 470–72 (2010) (explaining that Eisenberg's study is limited to a fairly narrow range of industries and that the use of arbitration by these types of businesses against other businesses is not truly "rare").

98. Drahozal & Ware, *supra* note 97, at 468.

99. *Id.* at 472–73.

100. *Id.*

101. *Id.* at 474, n.174. Drahozal and Ware questioned Eisenberg et al.'s conclusion that cell phone and credit card issuers use arbitration agreements only to avoid class relief. In their view, these companies use arbitration agreements as a means for collecting bad debts as well as to avoid class processes. *Id.*

utilize arbitration agreements with consumers in order to avoid class processes. Examining arbitration terms from thirteen wireless phone service and credit card contracts, Professor Amy Schmitz found that three did not include predispute arbitration agreements, one had an opt-out provision, and two had terms that were unavailable.[102] The remaining seven contracts containing arbitration clauses varied in some respects.[103] Importantly for this Article, however, Professor Schmitz found that "all of the contracts' arbitration provisions expressly precluded class action or consolidated proceedings of any kind, in court or in arbitration."[104] Professor Schmitz emphasized that her examination of nine wireless service companies' arbitration clauses confirmed Eisenberg's earlier conclusion that companies utilized arbitration clauses in consumer contracts in order to prevent class actions of any kind.[105] After reviewing these clauses, Professor Schmitz concluded that "companies use arbitration clauses to limit their vulnerability to consumer claims, especially class actions."[106]

Taken together, Eisenberg et al.'s comprehensive study, followed by Schmitz's survey, suggest strongly that financial services and telecommunications companies implement consumer arbitration agreements primarily to avoid class processes. The Searle data also offers general support for these conclusions, but suggests that other industries use arbitration agreements and class waivers less frequently or not at all. Professors Drahozal and Ware do not explain why these other businesses do not use class action waivers as frequently as do the telecommunications and financial services industry. While other explanations may ultimately prevail, it may be either that the uncertainty over the enforceability of such waivers,[107] or AAA's policy to refuse

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102. Schmitz, *supra* note 29, at 145–46.

103. *Id.* at 146.

104. *Id.*

105. *Id.* at 147–48. Professor Schmitz reviewed nine contracts and found that all of them included waivers of class proceedings in either court or arbitration. *Id.* at 148.

106. *Id.* at 150.

107. Some federal circuits have held that class action waivers are valid. These include the Fourth, Fifth, Seventh, and Eighth Circuits. *See* Adkins v. Labor Ready, Inc., 303 F.3d 496, 506–07 (4th Cir. 2002); Snowden v. CheckPoint Check Cashing, 290 F.3d 631, 638–39 (4th Cir. 2002); *In re* Cotton Yarn Antitrust Litig., 505 F.3d 274, 293 (4th Cir. 2007); Carter v. Countrywide Credit Indus., Inc., 362 F.3d 294, 301–02 (5th Cir. 2004); Iberia Credit Bureau, Inc. v. Cingular Wireless LLC, 379 F.3d 159, 174–76 (5th Cir. 2004); Livingston v. Assocs. Fin., Inc., 339 F.3d 553, 558–59 (7th Cir. 2003); Iowa Grain v. Brown, 171 F.3d 504, 509–11 (7th Cir. 1999); Cicle v. Chase Bank USA, 583 F.3d 549, 554–57 (8th Cir. 2009); Pleasants v. Am. Express Co., 541 F.3d 853, 859 (8th Cir. 2008); Dominium Austin Partners, LLC v. Emerson, 248 F.3d 720, 728–29 (8th Cir. 2001).

administration of cases that include class arbitration waivers, discourages these businesses from wholesale adoption of class process waivers.

If the uncertainty of class process waiver enforceability or AAA and others' policies not to administer cases containing class arbitration waivers initially discouraged some businesses from adopting class process waivers in arbitration agreements, the Court's decisions in *Concepcion* and *Stolt-Nielsen* go far in alleviating concern about risking use of a waiver and may, for all practical purposes, eliminate class arbitrations. As a result, it is likely that businesses will increase their use of consumer arbitration agreements, even in those industries that were initially slow to adopt them. To understand fully why this is the case, this Article now turns to these decisions.

III. RECENT SUPREME COURT ARBITRATION JURISPRUDENCE

In the 2010 term, the Supreme Court held that an arbitration agreement is enforceable even when the effect of the arbitration agreement is to preclude class arbitration processes.[108] Following an earlier Supreme Court decision in *Green Tree Financial Corp. v. Bazzle* (*Bazzle*), in which a plurality of the Justices held that the parties could delegate to the arbitrator the power to decide whether or not a class action arbitration is permissible,[109] the Court in *Concepcion* and *Stolt-Nielsen* virtually

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The Third Circuit previously tended to allow class action waivers. *See* Gay v. CreditInform, 511 F.3d 369, 395 (3d Cir. 2007) (noting that access to class actions is not a right but rather is a procedural option and so it can be waived); Cronin v. Citifinancial Servs., Inc., 352 F. App'x. 630, 636–37 (3d Cir. 2009). However, the Third Circuit recently ruled that class action waivers violate the public policy of New Jersey. Homa v. Am. Express Co., 558 F.3d 225, 230 (3d Cir. 2009).

The Eleventh Circuit allows class action waivers as long as a fee-shifting feature exists. *See* Jenkins v. First Am. Cash Advance of Ga., LLC, 400 F.3d 868, 878 (11th Cir. 2005), *cert. denied*, 546 U.S. 1214 (2006); Dale v. Comcast Corp., 498 F.3d 1216, 1224 (11th Cir. 2007).

The First, Second, and Ninth Circuits have found class action waivers unconscionable or unenforceable. *See* Kristian v. Comcast Corp., 446 F.3d 25, 60–64 (1st Cir. 2006); Skirchak v. Dynamics Research Corp., 508 F.3d 49, 59 (1st Cir. 2007); *In re* Am. Express Merchants' Litig., 634 F.3d 187, 197–99 (2d Cir. 2009); Ting v. AT&T, 319 F.3d 1126, 1150 (9th Cir. 2003), *cert. denied*, 540 U.S. 811 (2003); Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1176 (9th Cir. 2003), *cert. denied*, 540 U.S. 1160 (2004); Circuit City Stores, Inc. v. Mantor, 335 F.3d 1101, 1107 (9th Cir. 2003), *cert. denied*, 540 U.S. 1160 (2004); Al-Safin v. Circuit City Stores, Inc., 394 F.3d 1254, 1262 (9th Cir. 2005); Shroyer v. New Cingular Wireless Servs., Inc., 498 F.3d 976, 984 (9th Cir. 2007). The Sixth and Tenth Circuits have yet to rule on the issue.

108. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1775–76 (2010).

109. Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 451–53 (2003) (plurality opinion) (remanding the case so that the arbitrator could decide whether the contract allowed class arbitration). Below, in *Bazzle v. Green Tree Financial Corp.*, the South Carolina Supreme Court affirmed the arbitrator's decision to order class action arbitration. After

closed the door on the possibility that courts will offer assistance to parties seeking some way to aggregate their claims in class arbitration, unless the parties clearly and unmistakably express their intent to permit such aggregation.

Before *Stolt-Nielsen* was decided, arbitrators could, and often did, order class action arbitration when the parties' arbitration agreement was silent regarding whether such action was permitted.[110] Although businesses likely wished to avoid this result, they were reluctant to explicitly prohibit class actions or class action arbitration because some courts held that class action waivers, particularly in the consumer context, were unconscionable and unenforceable.[111] As a result, many companies maintained arbitration agreements silent on the issue of class actions, hoping that the arbitrator assigned their case would not order class action arbitration.[112]

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acknowledging that the state's laws permitted consolidation of arbitrations without the parties' express consent, that court explained that "[i]f we enforced a mandatory, adhesive arbitration clause, but prohibited class actions in arbitration where the agreement is silent, the drafting party could effectively prevent class actions against it without having to say it was doing so." Bazzle v. Green Tree Fin. Corp., 569 S.E.2d 349, 360 (S.C. 2002).

110. *See Bazzle*, 539 U.S. at 449, 451–54 (plurality opinion); Dealer Computer Servs., Inc. v. Dub Herring Ford, 623 F.3d 348, 350 (6th Cir. 2006) (arbitration panel permitted defendants to arbitrate as a class); Jock v. Sterling Jewelers, 725 F. Supp. 2d 444, 445 (S.D.N.Y. 2010), *rev'd*, 646 F.3d 113 (2d Cir. 2011) (explaining an arbitrator's June 1, 2009, decision to order class arbitration when the arbitration agreement failed to expressly prohibit class claims); Sutter v. Oxford Health Plans LLC, 227 Fed. Appx. 135, 137–38 (3d Cir. 2007) (affirming the arbitrator's issuance of a final class determination award based on an arbitration agreement requiring adherence to the American Arbitration Association's Supplementary Rules for Class Arbitration); Cable Connection, Inc. v. DirectTV, Inc., 49 Cal. Rptr. 3d 187, 201 (Cal. Ct. App. 4th 2006), *rev'd*, 82 Cal. Rptr. 3d 229 (upholding the arbitrator's decision to allow class arbitration when there was no express provision in the agreement prohibiting classwide arbitration). For example, the arbitrators in *Bazzle* ordered class action arbitration when the arbitration agreement was silent on the issue of class action arbitration.

111. *See supra* note 107 and accompanying text.

112. Another reason that companies might have chosen to leave arbitration agreements silent on the issue of class actions is that both AAA and JAMS, the major arbitrator providers, approved of class processes or were silent on the issue. *AAA Policy on Class Arbitrations*, AM. ARBITRATION ASS'N (July 14, 2005), http://www.adr.org/sp.asp?id=28779 (stating that because of the decision in *Bazzle*, AAA "is not currently accepting for administration demands for class arbitration where the underlying agreement prohibits class claims" unless a court orders AAA to administer arbitration on a class basis); *JAMS Class Action Procedures*, JAMS, http://www.jamsadr.com/rules-class-action-procedures/ (last visited July 20, 2011). AAA based its policy on its interpretation of *Bazzle*. AAA's class arbitration policy stated:

> In *Bazzle*, the Court held that, where an arbitration agreement was silent regarding the availability of class-wide relief, an arbitrator, and not a court, must decide whether class relief is permitted. Accordingly, the American Arbitration Association will administer demands for class arbitration pursuant to its Supplementary Rules for Class Arbitrations if (1) the underlying

In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, the Court, in a 5–3 decision written by Justice Alito,[113] reduced businesses' uncertainty by casting doubt on the continuing viability of class action arbitration as an alternative dispute resolution mechanism, at least in agreements where the issue of class action arbitration is not explicitly addressed.[114]

The case involved two sophisticated business parties with relatively equal bargaining power who negotiated an arbitration agreement that did not address the question whether class action arbitration was permissible.[115] At arbitration, the parties stated

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agreement specifies that disputes arising out of the parties' agreement shall be resolved by arbitration in accordance with any of the Association's rules, and (2) the agreement is silent with respect to class claims, consolidation or joinder of claims.

AAA Policy on Class Arbitrations, AM. ARBITRATION ASS'N, (July 14, 2005), http://www.adr.org/sp.asp?id=28779. Moreover, AAA stated that it would not currently handle arbitrations if the parties' arbitration agreement precluded class processes. *Id.* JAMS, the other major provider, adopted a similar rule. JAMS, CLASS ACTION PROCEDURES 23 (2009), *available at* http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Class_Action_Procedures-2009.pdf. Rule 1a of JAMS's class arbitration policy states that "JAMS will not administer a demand for class action arbitration when the underlying agreement contains a class preclusion clause, or its equivalent, unless a court orders the matter or claim to arbitration as a class action." *Id.*; *see also* Alan S. Kaplinsky & Mark J. Levin, *Is JAMS in a Jam Over Its Policy Regarding Class Action Waivers in Consumer Arbitration Agreements?*, 61 BUS. LAW. 923, 925 (2006) (stating that on November 12, 2004, JAMS issued a policy whereby it would no longer enforce class action waiver clauses in arbitration and that JAMS would accept class action arbitration cases, even if there is a class action preclusion clause, and not enforce the waiver); Press Release, JAMS, JAMS Reaffirms Commitment to Neutrality Through Withdrawal of Class Action Arbitration Waiver Policy (Mar. 10, 2005) http://web.archive.org/web/20071012032743/http://www.jamsadr.com/press/show_release_print.asp?id=198 (stating that JAMS revoked its policy announced in November of 2004 in light of recent court rulings on the validity of class action waivers and that JAMS would henceforth "apply the law on a case by case basis in each jurisdiction").

113. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010). Justice Alito authored the majority opinion, joined by Chief Justice Roberts and Justices Kennedy, Scalia, and Thomas. *Id.* at 1763. Justice Sotomayor did not take part in the consideration or decision of the case. *Id.*

114. *Id.* at 1775–76. The Court also held that the arbitrators' decision to order class action arbitration, based on their view that public policy favors class action arbitration, exceeded the scope of their powers under Federal Arbitration Act § 10(a)(4) and therefore can be disregarded. *Id.* at 1767–68. While this Article does not address the issue of scope of judicial review, I will note that this holding is remarkable because it suggests that courts may return to a more substantive review of arbitrator decisionmaking and that the doctrine of "manifest disregard" may still be viable despite the Court's earlier holding in *Hall Street v. Mattel, Inc.*, 552 U.S. 576, 584–85 (2008).

115. Stolt-Nielsen is a shipping company that charters portions of its vessels for customers who want to ship liquids in small quantities. *Stolt-Nielsen*, 130 S. Ct. at 1764. AnimalFeeds, which supplies raw ingredients to animal-feed producers around the world, contracted, using a standard maritime contract known as a "charter party," with Stolt-Nielsen to transport animal feed. *Id.* Charterers, like AnimalFeeds, select the particular charter party that they wish to use. *Id.* at 1764–65. In this case, the charter party AnimalFeeds selected contained an arbitration clause drafted in 1950. *Id.* The clause stated that any

that they never agreed to participate in a class arbitration.[116] Nevertheless, the arbitral panel ruled that class arbitration could proceed for two reasons. First, the panel held that the clause should be read to permit class action arbitration following the Court's decision in *Bazzle*.[117] Second, the panel concluded that it could order class arbitration because public policy favors class arbitration even if the arbitration agreement does not address class arbitration.[118]

The Supreme Court ruled that the arbitrators should not have relied on AnimalFeeds's argument that public policy permits an arbitrator to construe an arbitration clause to allow class arbitration.[119] Instead of relying on their view of public policy, the arbitrators should have identified a rule of law (for example, the FAA, federal maritime law, or New York law) that governs the issue of class arbitration.[120] Their failure to do so, combined with their choice to act as a common law court to develop what they viewed as the best rule for the situation, exceeded the scope of the panel's powers under the agreement and, therefore, had to be reversed.[121]

Justice Ginsburg, in dissent, expressed concern that the holding, which prohibits arbitrators from ordering class arbitration unless the parties' agreement allows them to do so, remained limited to agreements among repeat players. Justice Ginsburg stated, "by observing that 'the parties [here] are sophisticated business entities,' and 'that it is customary for the shipper to choose the charter party that is used for a particular shipment,' the Court

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disputes arising out of the contract will be settled in New York through tri-partite arbitration. *Id.* at 1765. The Department of Justice initiated a criminal investigation of Stolt-Nielsen in 2003, concluding that they were engaging in illegal price-fixing. *Id.* AnimalFeeds brought a class action against Stolt-Nielsen in federal court, as did other charterers. *Id.* Ultimately, AnimalFeeds was ordered to arbitration and filed a class action arbitration complaint against Stolt-Nielsen. *Id.* The parties entered into a supplemental agreement enabling the arbitrators to decide whether class action arbitration was permitted. *Id.*

116. *Id.* at 1775.

117. *Id.* at 1766, 1769. The Court stated that *Bazzle* did not create a rule to be applied in deciding whether class arbitration is permitted. *Id.* at 1772. Rather (and the Court reminded readers that *Bazzle* was a plurality decision), the Court in *Bazzle* stated that arbitrators, rather than courts, interpret whether the parties agreed to class action arbitration. *Id.* at 1771–72. Thus, *Bazzle* did not bind the Court in this case, and the Court stated that "[a]n implicit agreement to authorize class action arbitration, however, is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate." *Id.* at 1771–72, 1775.

118. *Id.* at 1768–69.

119. *Id.* at 1768–70.

120. *Id.*

121. *See id.* at 1770, 1774 (holding that the arbitrators exceeded their power and that an arbitrator's authority is derived from the agreement of the parties).

apparently spares from its affirmative-authorization requirement contracts of adhesion presented on a take-it-or-leave-it basis."[122] While Justice Ginsburg suggests that the majority's holding about silent arbitration clauses is limited to cases involving sophisticated repeat players, it is not clear that lower courts will limit *Stolt-Nielsen* to its facts.[123] A probable consequence of the decision is that every business with an arbitration clause will maintain silence on the issue of class action arbitration or, if its clause permits class action arbitration, will amend it so that it is silent on the issue.[124] Although the Court did not decide "what contractual basis may support a finding that the parties agreed to authorize class-action arbitration," a logical interpretation of the opinion suggests that courts will not allow arbitrators to interpret silent clauses to permit class action arbitration.[125]

The Court's decision appears to prohibit future arbitrators from interpreting an arbitration agreement that is silent on the issue of class action arbitrations to allow for such arbitrations unless the parties, post-agreement, explicitly consent to the class action arbitration process.[126] In addition, the Court's suggestion

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122. *Id.* at 1783 (Ginsburg, J., dissenting).

123. *Id.* Paul Kirgis reached the same conclusion. In a blog post at http://www.indisputably.org, Professor Kirgis stated, "Justice Ginsburg, in dissent, makes the point that this decision does not necessarily foreclose class arbitrations in consumer cases. But [its] logic does not stop at complex commercial disputes." Paul Kirgis, *More on* Stolt-Nielsen v. AnimalFeeds, ADR PROF BLOG (Apr. 29, 2010), http://www.indisputably.org/?p=1284. Philip J. Loree, a commercial litigator who has written extensively on this case, agreed as well. According to Loree, *Stolt-Nielsen* "put the kibosh on class arbitration in the commercial context and most probably also in the context of adhesive contracts." Loree, *supra* note 5, at 121 (2010).

But H. Scott Leviant disagrees, at least in California: "so much for *Stolt-Nielsen* destroying class actions." H. Scott Leviant, Stolt-Nielsen S.A. et al. v. AnimalFeeds International Corp.: *Less Than Meets the Eye*, THE COMPLEX LITIGATOR (May 3, 2010), http://www.thecomplexlitigator.com/post-data/2010/5/3/stolt-nielsen-s-a-et-al-v-animalfeeds-international-corp-les.html. He believes that the motives behind California's default rules favoring class arbitration apply most strongly in consumer disputes. *See id.* (likening California's reason for finding a default rule against agreements barring class actions to Justice Ginsburg's claim that courts have invalidated such agreements because they prevent claimants from proceeding due to the high cost of litigation, and noting that in consumer wage and hour employment arbitrations, there is often a disparity in sophistication between the parties).

124. *See* Kirgis, *supra* note 123 ("So it is difficult to read the decision as anything but an attempt to single out and eliminate class arbitration, except in cases where the parties explicitly provide for class arbitration (which will be never).").

125. *Stolt-Nielsen S.A.*, 130 S. Ct. at 1776 n.10.

126. *Id.* at 1775. Professor Jean Sternlight, among others, predicted that the decision will mean the end of class arbitration. Jean Sternlight, *Sternlight on* Stolt-Nielsen v. AnimalFeeds, ADR PROF BLOG (Apr. 29, 2010), http://www.indisputably.org/?p=1287. Moreover, Sternlight suggested, companies will rely on *Stolt-Nielsen* to argue that the FAA preempts a claim that prohibition of class actions is unconscionable. *Id.*

that an arbitrator could look to some rule of law to support ordering class arbitration seems like a straw man. Nothing in the FAA addresses class arbitration, and the Court itself indicated that class arbitration is so different from traditional arbitration that it is hard to imagine a court finding that the FAA is a source of authority for ordering class arbitration.[127] What other rules of law would be available to justify ordering class action arbitration is also unclear. Because businesses prefer to avoid class actions, they will likely ignore the issue of class arbitration in their arbitration agreements to avoid the possibility that arbitrators will find that they agreed to class action arbitration.

Following *Stolt-Nielsen*, one might have believed that a consumer could still argue that an arbitration agreement that is silent on the issue of class arbitration is unconscionable if it is interpreted to preclude class actions or class arbitration. That question may be unlikely to arise, however, in light of the Court's more recent decision in *AT&T v. Concepcion*.[128] *Concepcion* raised the question of whether the FAA prevents states from conditioning the enforceability of certain consumer arbitration agreements on the availability of class arbitration procedures.[129]

The Concepcions were part of a consumer class action brought in California, contending that AT&T engaged in fraud when it offered a "free" phone to all customers who signed up for their service but then charged each consumer substantial sales

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Alvin L. Goldman suspects that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so." Alvin L. Goldman, *Goldman's Take on AnimalFeeds*, ADR PROF BLOG (May 3, 2010), http://www.indisputably.org/?p=1295.

Barry Barnett points out that the recent Second Circuit decision, *Fenterstock v. Education Finance Partners*, 611 F.2d 124, 141 (2d Cir. 2010), confirms his earlier suspicion that arbitrators "will have no choice but to deny almost all class certification requests." Barry Barnett, Stolt-Nielsen *Kills Class Arbitration But Not Class Action, Second Circuit Holds*, BLAWGLETTER (July 12, 2010, 3:55 PM), http://blawgletter.typepad.com/bbarnett/2010/07/stoltnielsen-kills-class-arbitration-but-not-class-action-second-circuit-holds.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+Blawgletter+%28Blawgletter%C2%AE%29.

127. *Stolt-Nielsen*, 130 S. Ct. at 1775–76.

128. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).

129. *Id.* at 1744. The question whether a class action or class arbitration waiver in a consumer arbitration agreement is enforceable is "[o]ne of the most important arbitration questions that has yet to be definitively resolved by the U.S. Supreme Court." Alan S. Kaplinsky & Mark J. Levin, *Consensus or Conflict? Most (But Not All) Courts Enforce Express Class Action Waivers in Consumer Arbitration Agreements*, 60 BUS. LAW. 775, 775 (2005); F. Paul Bland, Jr. & Claire Prestel, *Challenging Class Action Bans in Mandatory Arbitration Clauses*, 10 CARDOZO J. CONFLICT RESOL. 369, 370 (2009) (enforceability of class waivers is "one of the most hotly contested issues in consumer and employee litigation").

tax ($30.22 for phones delivered to the named plaintiff).[130] After the plaintiff filed its claim in federal court, AT&T moved for arbitration.[131] The court, relying on California unconscionability law, held that the contract's prohibition on class actions was unenforceable.[132] Unlike arbitration provisions at issue in other cases, though, AT&T's provision provided the plaintiffs the ability to obtain full relief for their claims. The arbitration agreement applied AAA procedural rules, gave the consumer the option to bring his claim in small claims court in lieu of arbitration, permitted the arbitrator to award the full remedies that would have been available to the consumer in court, and offered the consumer a $7,500 minimum recovery if the arbitral award exceeded AT&T's last settlement offer.[133]

The primary issue in this case was whether California's treatment of unconscionability in the context of arbitration agreements differs from its treatment of unconscionability in traditional contracts.[134] If the treatment differed, as AT&T contended, the FAA would preempt California's rule.[135] The question of whether a class waiver is unconscionable first arose in an earlier California case, *Discover Bank v. Superior Court (Boehr)*.[136] In *Discover Bank*, a California court ruled that class action arbitration must be made available to consumers with arbitration agreements in order for those agreements to be

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130. *Concepcion*, 131 S. Ct. at 1744.

131. *Id.* at 1744–45.

132. *Id.*

133. *Id.* at 1744; *see also* Laster v. AT&T Mobility LLC, 584 F.3d 849, 856 n.10 (9th Cir. 2009) (detailing the AT&T consumer policies), *rev'd sub nom.* AT&T Mobility LLC v. Concepcion, 131 S. Ct 1740 (2011).

134. *Concepcion*, 131 S. Ct. at 1746.

135. *Id.* at 1747. In its brief, AT&T contends that for traditional contracts, California requires proof that the contract's terms shock the conscience. Brief for Petitioner at 18, AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011) (No. 09-893). By contrast, for arbitration agreements, AT&T states that California applies the *Discover Bank* test, which is a different kind of test. Brief for Petitioner, *supra*, at 32–33. The Ninth Circuit rejected this argument, stating that the *Discover Bank* test "is simply a refinement of the unconscionability analysis applicable to contracts generally in California." Shroyer v. New Cingular Wireless Servs., Inc., 498 F.3d 976, 987 (9th Cir. 2007). AT&T further contends that California treats arbitration agreements differently than other contracts because they looked at the impact of the class waiver in the Concepcions' agreement on nonparties to the agreement in order to justify the unconscionability finding. *See* Brief for Petitioner, *supra*, at 32, 34–36 (arguing that California's treatment of unconscionability claims in arbitration agreements differs from their treatment of unconscionability claims when applied to contracts generally, including as an example the fact that the lower court based their finding of unconscionability in *Concepcion* on persons other than parties to the litigation, a "standard that finds no support in California's generally applicable unconscionability principles"). This approach stands in sharp contrast to traditional unconscionability analysis, which would only allow a court to examine the situation in front of the court, not the impact of the contract on third parties. *Id.*

136. Discover Bank v. Superior Court, 113 P.3d 1100, 1110 (Cal. 2005).

enforceable.[137] According to petitioner AT&T, California adopted a three-part test in the *Discover Bank* case to evaluate the enforceability of an arbitration agreement.[138] Under the test, a court will declare an agreement unconscionable if it is found in a consumer contract of adhesion, "in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money."[139] This test, AT&T claimed, is significantly different than the test used to evaluate whether unconscionability is present in contracts that do not contain arbitration agreements.[140] The Ninth Circuit rejected this argument, holding that the FAA does not preempt the *Discover Bank* rule because class proceedings do not reduce the efficiency of arbitration, and that the rule is "simply a refinement of the unconscionability analysis applicable to contracts generally in California."[141]

The Supreme Court held that California's rule applied the unconscionability analysis differently in arbitration agreements than when analyzing other contracts and was, therefore, preempted.[142] The Concepcions argued to the Court that the

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137. *Id.*; *see also* Szetela v. Discover Bank, 118 Cal. Rptr. 2d 862, 866–88 (2002) (finding an arbitration clause that prohibited class treatment of small individual claims both procedurally and substantively unconscionable).

138. Brief for Petitioner, *supra* note 135, at 4.

139. *Discover Bank*, 113 P.3d at 1110.

140. Brief for Petitioner, *supra* note 135, at 18.

141. Laster v. AT&T Mobility LLC, 584 F.3d 849, 856 (9th Cir. 2009) (quoting Shroyer v. New Cingular Wireless Servs., Inc., 498 F.3d 976, 987 (9th Cir. 2007)), *rev'd sub nom.* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011). The Third Circuit, addressing the same question, ruled that the FAA preempts Pennsylvania's rule that provisions waiving the right to bring a class action are unconscionable. *See* Gay v. CreditInform, 511 F.3d 369, 387–95 (3d Cir. 2007) (noting that, while Virginia law applies under the arbitration agreement's choice of law provisions, the arbitration agreement would still be enforceable under Pennsylvania law because the FAA preempts certain Pennsylvania court decisions finding class action waivers unconstitutional). The court stated:

> [W]hatever the benefits of class actions, the FAA "*requires* piecemeal resolution when necessary to give effect to an arbitration agreement," . . . . To the extent, then, that [Pennsylvania cases] hold that the inclusion of a waiver of the right to bring judicial class actions in an arbitration agreement constitutes an unconscionable contract [FAA Section 2 preempts them].

Id. at 394 (quoting Moses H. Cone Mem'l Hosp. v. Mercury Cont. Corp., 460 U.S. 1, 20 (1983)).

142. *See* AT&T Mobility v. Concepcion, 131 S. Ct. 1740, 1745–48 (2011) (noting that a court may not find an agreement to arbitrate unconscionable based on the uniqueness of arbitration, and describing examples of cases in which the *Discover Bank* rule could be used to find agreements unconscionable based on the uniqueness of arbitration). Stephen

application of the class waiver rule to both litigation and arbitration immunized the rule from preemption.[143] Citing an example of a court decision that would require judicially monitored discovery in a consumer arbitration agreement in order to avoid an unconscionability finding, the Supreme Court, however, emphasized that applicability to all contracts does not avoid preemption if "the rule would have a disproportionate impact on arbitration agreements" even though it would apply to discovery in litigation as well.[144] Moreover, the Court stated, judicial decisions that interfere "with [the] fundamental attributes of arbitration," are inconsistent with the purposes of the FAA and would also be preempted.[145] The Court cited a requirement that class wide arbitration be available as an example of this type of problematic ruling.[146] The Court went on to detail the myriad ways in which class wide arbitration differed from traditional bilateral arbitration—that the process was slower, more expensive, more procedurally formal, and more likely to create risks to defendants—to bolster its conclusion that its implementation would be an obstacle to achieving Congress's goals in enacting the FAA.[147]

While scholars will undoubtedly question the preemption analysis the majority used in this case,[148] the Court's holding

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A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Judiciary is Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39, 44–48, 65–66 (2006) (asserting that California applies a unique brand of unconscionability to arbitration agreements in direct contravention of the FAA, and establishing through empirical analysis that application of the unconscionability doctrine in California results in invalidating arbitration agreements 47% of the time but invalidating other contracts only 11% of the time).

143. *Concepcion*, 131 S. Ct. at 1746–47.

144. *Id.* at 1747. The Court offered another example to prove its point. The Court stated that a rule which made it unconscionable to fail to abide by the Federal Rules of Evidence would have a similarly disproportionate impact on arbitration and therefore be preempted. *Id.*

145. *Id.* at 1748.

146. *Id.*

147. *Id.* at 1750–52.

148. The Court's rejection of the argument that California's unconscionability analysis should not be preempted because it applied in both litigation and arbitration was surprising. The Court ultimately asserted that the change in unconscionability analysis had greater impact on arbitration than on litigation and interfered with the goals of the FAA and, on those two grounds, was preempted. *Id.* at 1747–48, 1750, 1753. On the latter point, the Court went on to emphasize that the fundamental incompatibility between class arbitration and the goals of the FAA indicate that a rule conditioning enforceability of an arbitration agreement on the availability of class arbitration should be preempted. *Id.* at 1748, 1753. Importantly, too, this case originated in federal court rather than state court. *Id.* at 1744. If Justice Thomas continued his practice of refusing to apply the FAA preemption doctrine in state court, the outcome in a case similar to *Concepcion* coming from state court might be

clearly precludes lower courts from requiring parties subject to an arbitration agreement to participate in a class action arbitration to avoid a finding of unconscionability.[149] Thus, a consumer with a low value claim who is unable to convince a court that his arbitration agreement is not one-sided enough to be declared unconscionable for reasons other than that it waives class action participation, but who also cannot afford or did not find it cost-efficient to bring his case in arbitration, would effectively be precluded from bringing a claim at all. The Supreme Court did not explicitly narrow its decision to preclude states from ordering class arbitration if consumers can effectively vindicate their claims in individual arbitration, although it did discuss the ability of the Concepcions to effectively pursue their claim in bilateral arbitration.[150]

Considered together, *Stolt-Nielsen* and *Concepcion* make clear that it will be the rare case indeed where consumers will be able to obtain class procedures if they are bound to an arbitration

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different. Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 460 (2003) (Thomas, J., dissenting).

149. *Concepcion*, 131 S. Ct. at 1748. Whether the Court would find provisions other than class action arbitration waivers unenforceable is an interesting question. The Court's objection to class arbitration seemed to be based on it being fundamentally different than, and at odds with, traditional bilateral arbitration. *Id.* at 1750–52. To the extent that subsequent state court rulings turn arbitration into something different, one would expect *Concepcion* to apply.

150. *Id.* at 1753. The Supreme Court did not take the best case for resolving the issue of preemption and unconscionability. As is pointed out repeatedly by AT&T, the arbitration agreement in the AT&T contract with the Concepcions is unusually generous with respect to its terms. The Concepcions' agreement with AT&T applies AAA's procedural rules, permits the plaintiffs to bring their claims in small claims court in lieu of arbitration, and permits the arbitrator to award any remedies that the plaintiffs could have obtained in court. *See id.* at 1744 (noting that the agreement permitted both parties to bring claims in small claims court in lieu of arbitration and permitted the arbitrators to award any remedy that a plaintiff could have been awarded by a court); Laster v. AT&T Mobility LLC, 584 F.3d 849, 856 n.10 (9th Cir. 2009), *rev'd sub nom.* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1470, 1744 (2011) (noting that the agreement applied AAA's procedural rules). In addition, plaintiffs would be entitled to a minimum $7,500 recovery if the arbitral award exceeded AT&T's last settlement offer. *Id.* While consumer arbitration agreements have, over time, offered fairer arbitral process to consumers, most agreements are not this generous to consumers. *See Mandatory Binding Arbitration Agreements: Are they Fair for Consumers?: Hearing Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary*, 110th Cong. (2007) (statement of Rep. Chris Cannon) (arguing that arbitration agreements are becoming increasingly common and that they are fair to consumers). Most arbitration agreements do not offer the small claims court alternative or the minimum recovery guarantee. *See* Jean Sternlight, *Cert. Granted in* AT&T Mobility v. Concepcion, ADR PROF BLOG (May 25, 2010), http://www.indisputably.org/?p=1346 (stressing the unusual nature of AT&T's arbitration clause). If the Court limits its holding to the facts of the case, holding that California's application of the unconscionability doctrine in this kind of arbitration setting is preempted, the question will remain open whether other, less generous agreements, would also be preempted.

agreement. Whether the Supreme Court's decision is "fair" or not is immaterial. The Court's interpretation of the FAA is that parties will not be required to participate in class arbitrations unless they agree to do so, and, most likely, courts will be unable to create blanket requirements that arbitration agreements that waive class action arbitration are unenforceable.

Following *Concepcion*, remedies for consumers with low value claims will no longer be available through the judicial system. Thus, consumers and their advocates must turn to Congress for assistance with this major concern. Unfortunately, the legislation currently before Congress, the AFA, is overbroad and creates more problems than it remedies. The next section of this Article will evaluate the proposed AFA and then offer a more streamlined and targeted solution to the problems present in consumer arbitration.

IV. LEGISLATIVE PROPOSAL TO REFORM ARBITRATION—THE ARBITRATION FAIRNESS ACT (AFA)

The AFA proposes amendments to the FAA invalidating predispute arbitration agreements covering an employment, consumer, or civil rights dispute.[151] In addition, the amendments would require a court, rather than an arbitrator, to decide any dispute regarding the applicability of the FAA as amended (i.e., by the AFA) to an arbitration agreement.[152]

To support the legislation, drafters included a provision articulating findings about arbitration that would, if true, seem to justify the draconian measures the legislation proposes. Among other "findings,"[153] the drafters emphasized that the FAA

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151. Arbitration Fairness Act, S. 987, H.R. 1873, 112th Cong. (2011).

152. *Id.*

153. In the 2011 introduction, the drafters edited the "findings" section. The new findings are similar but are abbreviated and considerably toned down. The primary changes were to eliminate references to the behavior and motivation of corporations adopting arbitration clauses. In 2011, the findings are as follows:

(1) The Federal Arbitration Act (now enacted as chapter 1 of title 9 of the United States Code) was intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power.

(2) A series of decisions by the Supreme Court of the United States have changed the meaning of the Act so that it now extends to consumer disputes and employment disputes.

(3) Most consumers and employees have little or no meaningful choice whether to submit their claims to arbitration. Often, consumers and employees are not even aware that they have given up their rights.

(4) Mandatory arbitration undermines the development of public law because there is inadequate transparency and inadequate judicial review of arbitrators' decisions.

was intended to apply to disputes between repeat players but has been extended to agreements between repeat and one-shot players, such as businesses and consumers.[154] Moreover, employees have no choice but to accept arbitration clauses because these clauses are often conditions of purchases or employment—items about which it is difficult to negotiate.[155]

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(5) Arbitration can be an acceptable alternative when consent to the arbitration is truly voluntary, and occurs after the dispute arises.

Id.

In 2009, by contrast, the bill contained the following findings:

(1) The Federal Arbitration Act (now enacted as chapter 1 of title 9 of the United States Code) was intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power.

(2) A series of United States Supreme Court decisions have changed the meaning of the Act so that it now extends to disputes between parties of greatly disparate economic power, such as consumer disputes and employment disputes. As a result, a large and rapidly growing number of corporations are forcing millions of consumers and employees to give up their right to have disputes resolved by a judge or jury, and instead submit their claims to binding arbitration.

(3) Most consumers and employees have little or no meaningful option whether to submit their claims to arbitration. Few people realize, or understand the importance of the deliberately fine print that strips them of rights; and because entire industries are adopting these clauses, people increasingly have no choice but to accept them. They must often give up their rights as a condition of having a job, getting necessary medical care, buying a car, opening a bank account, getting a credit card, and the like. Often times, they are not even aware that they have given up their rights.

(4) Private arbitration companies are sometimes under great pressure to devise systems that favor the corporate repeat players who decide whether those companies will receive their lucrative business.

(5) Mandatory arbitration undermines the development of public law for civil rights and consumer rights, because there is no meaningful judicial review of arbitrators' decisions. With the knowledge that their rulings will not be seriously examined by a court applying current law, arbitrators enjoy near complete freedom to ignore the law and even their own rules.

(6) Mandatory arbitration is a poor system for protecting civil rights and consumer rights because it is not transparent. While the American civil justice system features publicly accountable decision makers who generally issue written decisions, arbitration offers none of these features.

(7) Many corporations add to arbitration clauses unfair provisions that deliberately tilt the systems against individuals, including provisions that strip individuals of substantive statutory rights, ban class actions, and force people to arbitrate their claims hundreds of miles from their homes. While some courts have been protective of individuals, too many courts have erroneously upheld even egregiously unfair mandatory arbitration clauses in deference to a supposed Federal policy favoring arbitration over the constitutional rights of individuals.

Arbitration Fairness Act, S. 931, 111th Cong. (2009).

154. Arbitration Fairness Act, S. 987, H.R. 1873, 112th Cong. (2011).

155. *See id.* § 2 ("Most consumers and employees have little or no meaningful choice whether to submit their claims to arbitration."); Arbitration Fairness Act, S. 931, H.R. 1020, 111th Cong. § 2 (2009) ("Most consumers and employees . . . must often give up

Finally, the findings suggest that arbitration is a poor substitute for litigation because the decisionmakers are largely unaccountable both because arbitration takes place in private, and because the decisionmakers are rarely required to issue written opinions.[156]

Recent Supreme Court jurisprudence energized AFA proponents.[157] Yet a closer examination of the proposed statute reveals that the legislation focuses on the wrong issues. Eliminating predispute arbitration agreements signed by consumers and employees is excessively overbroad.[158] Even predictably antiarbitration groups have responded negatively to the proposed legislation. The three primary critiques,[159] one from

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their rights as a condition of having a job, getting necessary medical care, buying a car, opening a bank account, getting a credit card, and the like.").

156. Arbitration Fairness Act, S. 987, H.R. 1873, 112th Cong. (2011).

157. *See* Aryeh Mellman, *Lawmakers Respond to Supreme Court Ruling with Introduction of Arbitration Fairness Act*, THE LEADERSHIP CONF. (May 4, 2011), http://www.civilrights.org/archives/2011/05/1185-arbitration-fairness.html (noting that in light of the Supreme Court's decision in *AT&T v. Concepcion*, Senators Al Franken and Richard Blumenthal were expected to reintroduce the Arbitration Fairness Act); *Further Attacks on Employment Arbitrations*, CAL. EMP'T LAW (May 23, 2011), http://californiaemploymentlaw.foxrothschild.com/tags/arbitration-fairness-act-of-20 (last visited Sept. 2, 2011) (reporting that Senator Al Franken and others reintroduced the Arbitration Fairness Act in a move that seemed to respond to the Supreme Court's ruling in *AT&T Mobility v. Concepcion*).

158. *See* O. Russel Murray, *Arbitration Fairness Act—Right Problem, Wrong Solution*, THE LEARNED LAW. (Apr. 27, 2009) (stating that the proposed amendment is too broad because it completely voids all pre-dispute agreements rather than just the one-sided agreements that lack real consent); E. Gary Spitko, *Exempting High-Level Employees and Small Employers from Legislation Invalidating Predispute Employment Arbitration Agreements*, 43 U.C. DAVIS L. REV. 591, 598 (2009) (describing the AFA as "sweeping" and "too broad" while suggesting ways to reform arbitration legislation with respect to employment agreements).

159. Many others have criticized the AFA's broad reach. *See, e.g.*, Murray, *supra* note 158 ("One problem with the AFA's approach to fixing this issue, however, is that the solution is overbroad. In other words, the proposed cure is worse than the problem it tries to fix. A narrower solution, and one that avoids throwing out the baby with the bath water, would be to mandate pre-dispute 'opt-out' rights—give consumers, for example, the right to opt-out of arbitration at the time of purchase of the product or service."); Am. Bar Ass'n, Resolution 114, at 13–14 (Aug. 3–4, 2009), http://www.abanet.org/leadership/2009/annual/daily_journal/One_Hundred_Fourteen.doc (examining the AFA and stating the ABA's official policy of opposition to legislation "that would be inconsistent with established international commercial arbitration standards"); David L. Gregory & Edward McNamara, *Mandatory Labor Arbitration of Statutory Claims, and the Future of Fair Employment:* 14 Penn Plaza v. Pyett, 19 CORNELL J.L. & PUB. POL'Y 419, 457–58 (2010) (stating that despite its benign title, the AFA is "in fact hostile to labor and employment arbitration," and "a gross overreaction to the proven efficacy and fairness of labor and employment arbitration"); E. Gary Spitko, *Exempting High Level Employees and Small Employers from Legislation Invalidating Predispute Employment Arbitration Agreements*, 43 U.C. DAVIS L. REV. 591, 600 (2009) (stating that the AFA is "too broad," and that it should "exempt claims by or against certain high-level employees and claims by or against certain small employers"); Paul B. Marrow, *Determining if Mandatory*

an ADR organization and the other two from academics, will be discussed here.

The Association of Conflict Resolution (ACR), a group of both lawyer and non-lawyer mediators "dedicated to enhancing the practice and public understanding of conflict resolution," issued a report critiquing the AFA's extreme approach.[160] The Report acknowledged that the AFA's underlying goals, to improve access to procedure, protect due process, and ensure integrity in the arbitration process, were important.[161] Although ACR recognized that some predispute arbitration agreements created defective processes, it nevertheless concluded that the "AFA's remedy of completely prohibiting all such agreements . . . is not required in order to correct the problems underlying these agreements."[162]

ACR, not known in the past for its support of mandatory arbitration or arbitration generally,[163] identified a number of potential benefits the arbitration process might have for consumers and other one-shot players. According to ACR, "[p]re-dispute

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Arbitration is "Fair": Asymmetrically Held Information and the Role of Mandatory Arbitration in Modulating Uninsurable Contract Risks, 54 N.Y.L. SCH. L. REV. 187, 191–92 (2010) (stating that when asymmetrically held information gives rise to risks that are uninsurable, mandatory arbitration is a "'fair' measure of self-help"); Bradley Dillon-Coffman, *Revising the Revision: Procedural Alternatives to the Arbitration Fairness Act*, 57 UCLA L. REV. 1095, 1105, 1107 (2010) (explaining that Congress is "getting it wrong" with the proposed AFA); Press Release, U.S. Chamber of Commerce, Voters Strongly Back Arbitration, New Poll Shows (Apr. 2, 2008) (quoting Lisa Rickard, President of the U.S. Chamber Institute for Legal Reform, for the proposition that the AFA would eliminate access to a forum for many consumers and employees).

160. ACR TASK FORCE REPORT, *supra* note 8, at 4. These critiques were leveled against the 2009 Act, which is virtually identical to the 2011 Act (although the Act no longer exempts franchisees from AFA coverage). *Compare* Arbitration Fairness Act, S. 987, H.R. 1873, 112th Cong. (2011) *with* Arbitration Fairness Act, S. 931, H.R. 1020, 111th Cong. (2009). Because the 2011 Act is new, and because it is similar in language, new critiques are yet to appear.

161. ACR TASK FORCE REPORT, *supra* note 8, at 7.

162. *Id.*

163. In a sense, pre-dispute arbitration agreements, because they do not permit parties to exercise a knowing and voluntary choice, are inconsistent with the mission and values of an organization like ACR, whose mission is to give "voice to the choices for quality conflict resolution" and that "all people know their choices for conflict resolution." *See Who We Are*, ASS'N FOR CONFLICT RESOLUTION, http://www.acrnet.org/Page.aspx?id=530 (last visited Sept. 29, 2011). Although pre-dispute arbitration agreements *seem* inconsistent with ACR's mission and vision, ACR has, in other contexts, supported the use of arbitration. In fact, ACR endorsed the Revised Uniform Arbitration Act in 2006. In approving the RUAA, ACR emphasized that it is committed to arbitration and will endorse policies and statutory enactments that support the "fairness and integrity of the arbitration process." Press Release, Ass'n for Conflict Resolution, ACR Endorses Revised Unif. Arbitration Act (June 26, 2006), http://web.archive.org/web/20081013014140/http://www.acrnet.org/pdfs/ACR_RUAA_Decision_Press_Release_FINAL.pdf (search for ACRNet.org in the Internet Archive Index) (quoting Richard D. Fincher, ACR Vice-President).

mandatory arbitration has the potential for developing a fast, efficient, fair, low-cost dispute resolution process to which all citizens could gain access and whose procedures and practices are fair and transparent."[164] ACR recommended improving the processes and procedures provided in predispute arbitration agreements instead of "disenfranchising" one-shot players from utilizing an "affordable, viable, fair dispute resolution process to resolve their disputes in a timely manner."[165] Taking a realistic approach, ACR recognized that complete elimination of predispute arbitration processes might, as a practical matter, result in disenfranchisement of numerous one-shot players.[166] With the courthouse as the only forum for resolution, ACR emphasized that many parties might not be able to access such a forum or afford to obtain adequate representation from lawyers to participate in such a forum.[167] In addition, without predispute arbitration processes available, the increased number of cases in the court system is likely to result in a case load increase, which further impacts the efficiency of the adjudicatory system.[168] Finally, ACR emphasized that the elimination of predispute arbitration agreements ignores the strides that many professional organizations and dispute resolution providers have made to improve the arbitration process.[169]

Arbitration providers adopted consumer due process protocols to increase fairness in the dispute resolution process, as well as payment structures for claim filers that take into account the limited funds most consumers have to spend on a dispute resolution process.[170] Rather than throw the baby out with the bathwater, ACR proposed changes to the FAA that would ensure a higher level of due process to participants in predispute arbitration processes, including increased discovery, access to

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164. ACR TASK FORCE REPORT, *supra* note 8, at 7.

165. *Id.* at 7, 13–14.

166. *Id.*

167. *Id.*

168. *See id.* at 7 (noting that in the absence of binding, predispute arbitration agreements, courts might not be able to administer the projected increases in their caseloads); Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR"*, 19 FLA. ST. U. L. REV. 1, 3 (1991) ("In short, courts try to use various forms of ADR to reduce caseloads and increase court efficiency at the possible cost of realizing better justice."); Jeffery Wolfe, *The Times They Are a Changin': A New Jurisprudence for Social Security*, 29 J. NAT'L ASS'N ADMIN. L. JUDICIARY 515, 544–45 (2009) (illustrating that judges' attempts to deal with an ever-increasing caseload have failed).

169. ACR TASK FORCE REPORT, *supra* note 8, at 7–8, 81–82.

170. *See* Stephen Friedman, *Arbitration Provisions: Little Darlings and Little Monsters*, 79 FORDHAM L. REV. 2035, 2066 (2011) (explaining the AAA's fairness procedures).

representation, access to full statutory remedies, written decisions in higher value cases, arbitrator selection processes designed to ensure the selection of impartial and independent arbitrators, and mechanisms for ensuring that the proceedings are not costly or inconvenient to the one-shot player.[171]

Criticism emanates from the academy as well. Professor Amy Schmitz, in her article, *Regulation Rash? Questioning the AFA's Approach for Protecting Arbitration Fairness*, charged that the proposed AFA was potentially "too rash," and advocated instead a "more measured approach."[172] Like ACR, Professor Schmitz asserted that the need for some reform of arbitration, particularly in the consumer context, must be balanced against the importance of avoiding "needless protectionism."[173] Although most consumer advocates and academics have been reluctant to do so, Professor Schmitz acknowledged that empirical studies of consumer arbitration, like the 2009 Searle Institute study of AAA consumer arbitrations, reveal that consumers experience considerable success in arbitrations when they pursue claims against a business.[174]

Quite similar to ACR, Professor Schmitz recommends a more measured approach. Schmitz's proposal would effectively codify the Consumer Due Process Protocol. Instead of leaving the due process question to the parties or the arbitrator provider, Schmitz proposes to codify concepts like notice of the arbitration clause, balanced arbitrator selection, contained costs, adequate discovery, convenient hearing location, preservation of statutory remedies, access to small claims court, and allowance of class relief.[175]

Lew Maltby, drafter of a Model Arbitration Act which he proposes as an alternative to the AFA, codified many of Schmitz's recommendations. Maltby's Act includes a mandate that consumers pay limited fees and have a right to a neutral provider and a written opinion, if requested.[176] Perhaps more importantly, Maltby's

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171. *See* ACR TASK FORCE REPORT, *supra* note 8, at 6–8 (finding the AFA's remedy of eliminating all pre-dispute arbitration agreements unnecessary and noting that there have been efforts to improve the fairness and transparency of the arbitration process).

172. Schmitz, *supra* note 48, at 16.

173. *Id.* at 19.

174. *Id.* at 21 (citing SEARLE CIVIL JUSTICE INST., *supra* note 23); *See* Berner & Grow, *supra* note 6, at 72 (emphasizing consumers are unlikely to prevail against corporations). The study stated that consumers were successful in 53.3% of the 301 arbitrations studied and recovered an average of $19,255 or 52.1% of the damages they sought in those arbitrations. *Id.*

175. *Id.* at 20–29. In addition to the procedures identified above, Professor Schmitz also recommends codification of timely decisions, compliance with awards, and allowance for consolidation of claims and joinder of parties. *Id.* at 26–28.

176. Lew Maltby, *Model Arbitration Act* (on file with Houston Law Review).

Act permits consumers access to class action processes when necessary to vindicate their rights.[177] While not broad-sweeping in its application, Maltby's proposal would protect consumers with low-value claims in those cases where no alternate forum would be available.[178]

AFA critics agree that the right answer is not to throw out predispute arbitration agreements entirely but instead to make sure that arbitration works as a method for resolving disputes. ACR and Professor Schmitz attack the AFA on procedural grounds, attempting to ensure that arbitration of disputes between one-shot and repeat players takes place in an environment with sufficient due process.[179] While codification of procedural requirements might improve arbitration, the major arbitration services providers have already adopted the Consumer Due Process Protocol.[180] As a result, most arbitrations are conducted with the benefit of the enhanced procedural protections Schmitz advocates above.[181] As Schmitz notes, however, the Protocol did not address the issue of class relief.[182] It is likely that those negotiating the Protocol were unable to reach a compromise on this issue because it is so divisive. Failure to resolve this issue, together with recent Supreme Court jurisprudence, makes helping litigants aggregate their low-value claims the major issue in arbitration today. Thus, while I join the call for a result that preserves consumer arbitration, I propose a different solution.

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177. Maltby's Model Arbitration Act states that, "Class actions may be brought under circumstances in which they are necessary for the parties to be able to vindicate their legal rights." *Id.*

178. Although Maltby's Act addresses the class action waiver problem, I propose a broader solution so that satellite litigation surrounding the question of whether an alternate forum is available can be avoided.

179. *See* Schmitz, *supra* note 48, at 21 (demonstrating that the AFA's findings are negative towards arbitrator and arbitration providers because they presume heavy repeat-player bias); Igor M. Brin, *The Arbitration Fairness Act of 2009*, 25 OHIO ST. J. ON DISP. RESOL. 821, 839 (2010) (representing that ACR encourages a uniform act that fully complies with due process requirements).

180. One of the key findings in the Searle Institute Report was that the vast majority of consumer arbitration clauses *already* comply with the Due Process Protocol at the time the case is filed. SEARLE CIVIL JUSTICE INST., *supra* note 23, at 83 (reporting that 76.6% of arbitration clauses that come before AAA are consistent with the Consumer Due Process Protocol). In addition, AAA's protocol review identified noncompliance and followed through with a response to arbitration clauses that contained protocol violations. *Id.* at xiv, 89–92. The Report also noted that "more than 150 businesses have either waived problematic provisions on an ongoing basis or revised arbitration clauses to remove provisions that violated the Consumer Due Process Protocol" after AAA explained to them that their clauses did not comply. *Id.* at xiv.

181. *Id.* at xiv.

182. *Id.* at 28.

V. PROPOSED REVISION OF THE FEDERAL ARBITRATION ACT (FAA)

While calls for a legislative solution to this problem are not new, the recent Supreme Court decisions raised the stakes for consumers and their advocates because the decisions virtually prohibit arbitrators from ordering class processes.[183] With that in mind, I propose the following statute:

Section 1: Short Title of Act

> This Act shall be known as the "Consumer Class Action and Class Arbitration Waiver Reform Act."

Section 2: Definitions

> (a) "[C]ommerce includes all transactions arising out of interstate or international commerce;
>
> (b) a consumer is any person who uses, purchases, acquires, attempts to purchase or acquire, or is offered or furnished any real or personal property, tangible or intangible goods, services, or credit for personal, family or household purposes, and includes passengers and shippers of goods on common carriers in commerce."[184]

Section 3: Prohibition of Class Action and Class Action Arbitration Waivers in Consumer Arbitration Agreements

> An arbitration agreement between a consumer and a provider of goods or services is invalid to the extent that it precludes the consumer from accessing the court or arbitral system to participate in a class action as defined by Federal Rule of Civil Procedure 23.

This Article posits that this proposed legislation will permit consumers with low-value claims, who are bound by arbitration agreements, to pursue class processes in either arbitration or court. The primary objection to this legislation is likely to be that companies will no longer use arbitration clauses if they are required to participate in class arbitrations or class actions in court. In the briefing leading up to the *Concepcion* arguments, counsel and other interested parties vociferously argued that businesses would give up arbitration entirely if class processes were

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183. Both Quebec and Ontario have already invalidated the use of class action waivers in consumer agreements. The Consumer Protection Act, R.S.Q. 1978 c. P.40.1, amended by S.Q. 2006, c. 56 s. 11.1 (Can.) and the Consumer Protection Act, R.S.O. 2002, c. A.30 s. 8(1) (Can.) invalidate provisions that prevent a consumer from commencing or participating in a class action.

184. Section 2 of this Act is almost identical to Professor Jean Sternlight's proposed legislation designed to protect consumers' access to court. BRUNET ET AL., *supra* note 2, at 375 app. C.

required.[185] While class processes have significant costs, both for the corporation sued and often for the parties pursuing them, the idea that businesses would give up arbitration because of the risk that they might be required to participate in class arbitration is laughable.[186] In particular, evidence from AAA's administration of class arbitration claims strongly suggests that class arbitration, if permitted through legislation, will continue to thrive and provide another creative avenue through which parties can adjudicate their disputes. Moreover, the continued use of arbitration in the many jurisdictions that have prohibited class action waivers in arbitration agreements offers further support for the belief that businesses will continue to use arbitration even if class waivers are unenforceable.

A. *Businesses Will Continue to Use Arbitration Even if Class Arbitration and Class Action Waivers Are Unenforceable*

Following the Supreme Court's 2003 *Bazzle* decision, class arbitration became more common.[187] Although one would have

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185. In its opening brief, AT&T stated that "no rational business will agree" to class wide arbitration. Brief for Petitioner, *supra* note 135, at 22. Class arbitration, AT&T contended, is "a lose-lose proposition" with all the cost and risk of litigation but none of the procedural protections and appellate oversight. *Id.* at 53–55. *See also* Daniel R. Higginbotham, *Buyer Beware: Why the Class Arbitration Waiver Clause Presents a Gloomy Future for Consumers*, 58 DUKE L.J. 103, 122 (2008) (arguing that increased use of class arbitration will result in businesses reducing their use of arbitration). Of course, some businesses may prefer to take class actions to court. The benefits and drawbacks of class actions in court proceedings are well-documented elsewhere, including in articles examining the pros and cons of class arbitration. *See, e.g.*, Maureen A. Weston, *Universes Colliding: The Constitutional Implications of Arbitral Class Actions*, 47 WM. & MARY L. REV. 1711, 1714 (2006) (explaining that the use of the class action procedure for litigation may motivate parties to bring cases that for economic reasons might not be brought otherwise); Schwartz, *supra* note 5, at 1319 ("By aggregating low-cost/low-stakes or high-cost/low-stakes cases into a single high-cost/high-stakes case, class actions can realize potential process-cost economies of scale that make them a relatively inexpensive forum for the class members—both in terms of monetary and information costs."); Thomas Burch, Comment, *Necessity Never Made a Good Bargain: When Consumer Arbitration Agreements Prohibit Class Relief*, 31 FLA. ST. U. L. REV. 1005, 1027 (2004) (pointing out that many consumers may not know of their potential claims; in a class action, a single informed consumer will inform all other class members as per notice); Jeffrey J. Greenbaum & Jason L. Jurkevich, *Class Actions Waivers in Arbitration Agreements: Can They Survive?*, CLASS ACTION LITIG. RPT., Jan. 8, 2010, at 39, 45 ("Companies tend to be averse to class arbitration, believing that it combines the disadvantages of class action litigation . . . with the disadvantages of arbitration . . . .").

186. *See* Jay Tidmarsh, *Rethinking Adequacy of Representation*, 87 TEX. L. REV. 1137, 1167–68 (2009) (endorsing the idea that claim aggregation creates economic viability); Dana Lai, *Extending the Fraud-on-the-Market Presumption Beyond Basic: A Case of Poor Analogies and Over-Eager Courts*, 55 N.Y.L. SCH. L. REV. 1121, 1153–54 (2011) (reasoning that initial class certification costs are expensive).

187. *See* William K. Slate II & Eric P. Tuchmann, *Class Action Arbitrations*, 11 INT'L ARB. L. REV. 50 (2008) (illustrating that class arbitrations in the United States began in 2002). Although, as the *Concepcion* dissenters note, class arbitration is "well known in

expected businesses to draft language designed to avoid class arbitration following *Bazzle*, only some businesses, particularly credit card and cell phone companies, attempted to implement class arbitration waivers.[188] According to the Searle study, in its sample of 299 AAA arbitrations, only 36.5% of the cases arose out of arbitration clauses with a class action waiver.[189] Well over half of the arbitration clauses did not contain class arbitration waivers.[190] At the same time, class action arbitration as an ADR process grew in popularity. As of January 14, 2011, AAA was administering over 300 class action arbitrations.[191]

Businesses who failed to amend their arbitration agreements to explicitly preclude class arbitration may have done so out of concern that a court would declare the waiver to be unenforceable. Alternatively, it may be that businesses do not find the prospect of participation in class arbitration repugnant. Or, it may be that, in the circuits rejecting class action waivers as unconscionable or unenforceable, the corporations who have continued to use arbitration have done so because their arbitration policies are driven by the corporation's national approach to dispute resolution. That is, for a corporation like AT&T, it may make economic sense to continue a national policy of implementing consumer arbitration agreements even if, in the First, Second, and Ninth Circuits, parties are permitted to use class action processes if certain criteria are met.

Whatever the reason, for the last seven years, businesses continued to implement arbitration agreements even though they risked the possibility that an arbitrator would order them to

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California and followed elsewhere." AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1758 (2011) (Breyer, J., dissenting).

188. *See* SEARLE CIVIL JUSTICE INST., *supra* note 23, at 103. This is not to suggest that businesses are enthusiastic about class arbitrations. *See* David S. Clancy & Matthew M.K. Stein, *An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History*, 63 BUS. LAW. 55, 62 (2007) (clarifying that class arbitration is not prompt and inexpensive); Christopher R. Drahozal & Quentin R. Wittrock, *Franchising, Arbitration and the Future of the Class Action*, 3 ENTREPRENEURIAL BUS. L.J. 275, 286 (2009) (showing that the AAA has had a "steady flow of class arbitration filings"—around fifty per year—since issuing its class arbitration rules).

189. SEARLE CIVIL JUSTICE INST., *supra* note 23, at 103; Christopher Drahozal & Samantha Zyontz, *Private Regulation of Consumer Arbitration* 51 (Univ. of Kan. Sch. of Law, Working Paper No. 2011-4, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1904545.

190. SEARLE CIVIL JUSTICE INST., *supra* note 23, at 103.

191. According to AAA's searchable class arbitration docket, AAA is currently administering 307 class arbitration cases. AAA, *Searchable Class Arbitration Docket*, AMERICAN ARBITRATION ASSOCIATION, ADR.ORG (July 19, 2011), http://www.adr.org/sp.asp?id=25562.

participate in a class action arbitration process.[192] In balancing the costs and benefits of the use of arbitration, then, businesses appear to prefer arbitration, even with the possibility of class arbitration, to alternate forms of dispute resolution.[193] Thus, concerns about the demise of arbitration, should Congress outlaw class arbitration waivers, seem overblown.

B. *Class Arbitration May Prove to Be a Workable Dispute Resolution Process*

Although the *Concepcion* court described class arbitration as "well-known," class arbitration as a dispute resolution process is in its infancy.[194] Used primarily in California in the 1980s, following *Bazzle*, parties increased their use of class arbitration processes.[195] In response, AAA and JAMS quickly designed class arbitration rules to govern these cases. Not surprisingly, these rules basically mirror Federal Rule of Civil Procedure 23, addressing administration of class action procedures in court.[196]

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192. At least some plaintiffs' attorneys perceived a benefit to class action arbitration. *See* Joseph Jaramillo, *Recent Developments in Class Action Arbitration*, CAL. EMP'T LAW. ASS'N, 1 (July 28, 2006), http://www.gdblegal.com/documents/ArticlesAmicus_Briefs/Presentation_on_Class_Arbitrations.pdf ("Class arbitration offers the benefits of the class action device with potential advantages not present in court litigation. Employers have less opportunity for delay in arbitration proceedings, where discovery is often limited, as are the grounds for judicial review. Arbitration providers, such as the American Arbitration Association ("AAA") and JAMS, have class arbitration rules in place to govern the process. These rules track Federal Rule of Civil Procedure 23, and provide standards for class certification, class notice, and approval of settlements. Thus, class arbitration can be a viable alternative to class action litigation for employees subject to an enforceable arbitration agreement."); John H. Quisenberry & Susan Abitanta, *Can Employers Preclude Class Actions Through Mandatory Arbitration Agreements that Are Silent as to Whether Classes Are Permitted*, FORUM, June 2005, at 22, 24–26 (2005) (stating that classwide arbitration can provide parties with the same benefits as court class actions and is "available and preferred").

193. Moreover, class arbitration processes could be altered to make them more cost-effective and efficient, allowing businesses, as well as consumers, to benefit. Mark Weidemaier, *Arbitration and the Individuation Critique*, 49 ARIZ. L. REV. 69, 100–01 (2007). *See* Drahozal & Zyontz, *supra* note 189, at 14 ("[T]he Consumer Due Process Protocol and the JAMS Minimum Standards of Procedural Fairness for consumer arbitrations permit claimants to bring claims in small claims court rather than arbitration, even if the claims are subject to a pre-dispute arbitration agreement.").

194. *See id.* at 94–99 (stating that class arbitration has potential benefits both for consumers and businesses); Discover Bank v. Superior Court, 113 P.3d 1100, 1110 (2005) (noting that classwide arbitration is a "relatively recent development"), *abrogated by* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 740 (2011).

195. Drahozal & Zyontz, *supra* note 189, at 70; *see also* Keating v. Superior Court, 645 P.2d 1192, 1209 (Cal. 1982) (stating that class arbitration may "offer a better, more efficient, and fairer solution"), *rev'd in part*, Southland Corp. v. Keating, 465 U.S. 1 (1984).

196. Drahozal & Zyontz, *supra* note 189, at 94.

Shortly after *Bazzle*, and again more recently, commentators raised a number of potential concerns about class arbitration.[197] The primary criticisms of class arbitration are that it: (1) requires courts to use a more deferential standard to review class certification decisions and class arbitration awards than the abuse of discretion standard used to review trial court decisions;[198] (2) fails to protect the rights of the parties involved, at least in comparison to class actions conducted in court;[199] (3) is an expensive and slow

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197. *See* Clancy & Stein, *supra* note 188, at 62 (noting class arbitration is neither prompt nor inexpensive); Daniel R. Higginbotham, *Buyer Beware: Why the Class Arbitration Waiver Clause Presents a Gloomy Future for Consumers*, 58 DUKE L.J. 103, 119 (2008) (positing that a legislative prohibition on class arbitration waivers would create other problems including businesses reducing use of arbitration generally and providing inadequate procedure to parties in the class). *See also* Drahozal & Wittrock, *supra* note 188, at 287 (stating that evaluation of AAA's class arbitration docket would have to be done before conclusions about whether class arbitration is an adequate substitute for class actions could be drawn). Professor Drahozal noted in his statement before the House Judiciary Committee in 2009 that the next phase of the Searle Institute's Consumer Arbitration Task Force is to "consider the extent to which class actions are comparable to the individual arbitrations . . . for purposes of developing a baseline for evaluating the costs, speed, and outcomes of AAA consumer arbitrations." *Federal Arbitration Act: Is the Credit Card Indus. Using It to Quash Legal Claims?: Hearing Before the H. Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary*, 111th Cong. 131 (2009) (statement of Christopher R. Drahozal).

198. Lack of rigorous judicial review was one of the primary objections the *Concepcion* majority raised in its opinion. *See Concepcion*, 131 S. Ct. at 1752 ("The AAA rules do authorize judicial review of certification decisions, but this review is unlikely to have much effect . . . ."). The Court expressed concern about imposing excessive risk on defendants from court-ordered class arbitrations. *Id.* Other commentators also assert that class arbitration may be problematic because the standard of review for arbitration decisions (whether class certification decisions or arbitration awards) will be more deferential to the award than would the standard for reviewing decisions in court processes. *See* Weston, *supra* note 185, at 1722 (expressing concern that class arbitration lacks guarantees that nonparticipating members' rights will receive protection—a protection ensured in court proceedings by judicial review); Clancy & Stein, *supra* note 188, at 70 (questioning adequacy of judicial review). For example, one critic asserts that "[i]f the arbitrator's certification decision is subject to review only on FAA section 10 grounds or for 'manifest disregard of the law,' this would create a huge risk for a defendant: if a single 'renegade arbitrator' certified a questionable class, the defendant would immediately be threatened with enormous liability." Jack Wilson, *"No-Class-Action Arbitration Clauses," State-Law Unconscionability, and The Federal Arbitration Act: A Case for Federal Judicial Restraint and Congressional Action*, 23 QUINNIPIAC L. REV. 737, 778 (2004). *But see* Note, *Classwide Arbitration: Effective Adjudication or Procedural Quagmire?*, 67 VA. L. REV. 787, 805–09 (1981) (arguing that deferential review of class arbitration award does not present an "insurmountable obstacle[ ]"). One would expect that the application of the arbitral standard of review would result in the more frequent affirmance of the arbitrator's decision regarding class certification than would an appellate court's review of a lower court's certification decision because the standard is more deferential to the arbitrator's decision. Because class arbitrators have decided few cases, however, concerns about the standard of review have not emerged.

199. *See* Weston, *supra* note 185, at 1769–72 (discussing what process is due to class litigants). Some commentators suggest that the interaction between the courts and the arbitrator in the class arbitration process triggers state action and thus requires that class arbitrations satisfy due process requirements. Note, *supra* note 198, at 801 (stating

process;[200] and (4) provides an arbitrator selection mechanism that is inadequate.[201]

While the *Concepcion* majority and commentators express concern about these issues, as a practical matter, it appears that none of these potential concerns have come to fruition. AAA's website is home to the most comprehensive class arbitration data.[202] AAA reports that it has enjoyed a steady number of class arbitration filings since 2003. The data show that claimants filed approximately fifty class arbitration cases per year, dropping to thirty-six in 2007.[203] During that time period, arbitrators issued only ten class certification decisions.[204] It is not known whether these decisions were appealed. Of the remaining cases, most have settled or been withdrawn.[205] Only eleven cases reached the

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that judiciary involvement in class wide arbitration may trigger state action). In addition, critics are concerned about how and when prospective class members receive notice and whether they receive adequate representation during the class arbitration process. *Id.* at 799, 804. Several jurisdictions ordering parties to participate in class arbitration have required substantial judicial supervision in order to ensure that the rights of individuals participating in the process, or who are entitled to participate in the process, are protected. Among other things, courts have required supervision over issues such as whether arbitration is appropriate, how arbitrators will be selected, adequacy of representation, class certification, notice, and discovery. *See* Keating v. Superior Ct., 645 P.2d 1192, 1209–10 (Cal. 1982) (stating that court-ordered class arbitration could be appropriate "if properly administered and judiciously applied," though it would involve "a greater degree of judicial involvement than is normally associated with arbitration," including court supervision over class certification, notice, and potential settlements); Dickler v. Shearson Lehman Hutton, Inc., 596 A.2d 860, 866 (Pa. Super. Ct. 1991) (stating that the trial court would have to certify the class, oversee notice, and conduct a final review to "insure that class representatives adequately provide for absent class members," and discussing the potential complications in selecting an arbitrator if there is no trial court supervision); Cruz v. Pacificare Health Sys., Inc., 99 P.3d 1157, 1166–67 (Cal. 2003) (recognizing class arbitration as a "means of bringing collective legal action by parties bound to an arbitration agreement" and suggesting it would be appropriate for courts to supervise "the equitable distribution of assets resulting from a class recovery"); Izzi v. Mesquite Country Club, 231 Cal. Rptr. 315, 321–22 (Cal. Ct. App. 1986) (stating that courts must supervise class arbitration to "safeguard the rights of absent class members to adequate representation" and that class arbitration is appropriate in this situation because of the small per-member claim "based on a standardized document subject to common proof" and the significant potential for punitive damages).

200. *See* Clancy & Stein, *supra* note 188, at 62 (arguing that arbitration is not prompt, inexpensive, or streamlined).

201. *See* Weston, *supra* note 185, at 1772–73 (raising concerns about the arbitrator-selection process; specifically, that the absent class members are excluded from the selection process).

202. *See Comprehensive ADR*, AM. ARBITRATION ASS'N, http://adr.org/si.asp?id=4458 (last visited Aug. 20, 2011).

203. Drahozal & Wittrock, *supra* note 188, at 286 (reporting data obtained through authors' searching of AAA's website and other research).

204. Slate & Tuchmann, *supra* note 187, at 53.

205. *See id.* (reporting that from Oct. 8, 2003 to Jan. 1, 2008, 54 cases have settled and 16 cases have been withdrawn).

award stage, and none of those awards were on the merits.[206] The Supreme Court relied on these statistics to conclude that the class arbitration process is slower, more costly, and more likely to result in procedural formality than bilateral arbitration.[207] Yet the evidence the Court provided seems to reveal little about class arbitration as a process. The absence of class arbitration awards may establish that business defendants are being "pressured into settling questionable claims," or it may be evidence that the defendants did not believe pursuing the claim to resolution was worthwhile.[208] In the absence of an empirical study, neither the Court nor critics of the decision can be certain of the result. While this is not an argument that the Court's or other commentators' criticisms are invalid, it is a practical point—based on existing data, concerns about the viability of class arbitration as a dispute resolution process seem to be overstated.[209]

Moreover, if Congress chooses to abandon the proposed AFA and replace it with legislation designed to preserve individuals' rights to proceed through class arbitration or class actions in court, many of the current critiques of class arbitration would be eliminated as potential bases for attack on the class arbitration process. Ultimately, Congress could choose to outlaw class arbitration and allow individuals bound to arbitration agreements to proceed with class processes in court. If, instead, Congress chose to permit class arbitration, it might provide greater definition and clarification of the relationship between courts and arbitrators during the class

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206. *Id.* (reporting that in 2003, 6 cases were filed; in 2004, 65 cases; in 2005, 47 cases; in 2006, 58 cases; and in 2007, 41 cases).

207. The Court stated:

> As of September 2009, the AAA had opened 283 class arbitrations. Of those, 121 remained active, and 162 had been settled, withdrawn, or dismissed. Not a single one, however, had resulted in a final award on the merits. . . . For those cases that were no longer active, the median time from filing to settlement, withdrawal, or dismissal—not judgment on the merits—was 583 days, and the mean was 630 days.

AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1751 (2011). The dissent emphasized that the proper comparison is not class arbitration to bilateral arbitration but class arbitration to class litigation, and under that comparison, class arbitration would be considerably more efficient. *Id.* at 1759 (Breyer, J., dissenting).

208. *Id.* at 1752.

209. One would expect that potential defendants to class action arbitration, should it be mandated, will devise mechanisms to improve the process from their perspective. For example, arbitration clauses might more frequently require reasoned awards, including findings of fact or conclusions of law or broader standards of review. *See* Carole J. Buckner, *Due Process in Class Arbitration*, 58 FLA. L. REV. 185, 255–56, 260 (2006) (suggesting an approach for defendants that combines the pure arbitral model of class arbitration with a voluntary due process protocol, which would provide due process protection without regard to judicial involvement in the class arbitration).

arbitration process. These efforts would help legitimize the class arbitration process as a viable dispute resolution mechanism and address some of the criticisms of the class arbitration process.

C. *Impact on Arbitration of the Availability of Judicial Class Processes*

If the legislation proposed in this Article were to be enacted, corporations could, of course, choose to defend class actions in court rather than in arbitration. To avoid that possibility, it seems likely that businesses would continue to make individual arbitration more attractive to consumers and/or make small claims court options available, as AT&T did for the Concepcions.[210] Alternatively, businesses could participate in consumer class actions in court for those disputes the business is unable to resolve through other processes (such as mediation or individual arbitration).

Evidence from empirical analysis of corporations with arbitration clauses reveals two things: (1) arbitration generally benefits consumers with higher value claims, as well as corporations; and (2) in jurisdictions that have declared class action waivers unconscionable, corporations continue to use arbitration agreements. While corporations would obviously prefer not to participate in class actions, an effort to educate consumers about the benefits of arbitration, together with continuing efforts to ensure the fairness of consumer arbitration for consumers, ought to reduce the risk that corporations will frequently be confronted with class actions either in court or in arbitration.

VI. CONCLUSION

Unquestionably, businesses would prefer to avoid class processes when possible. Class processes are time consuming and often expensive. At the same time, precluding litigants with small claims from accessing a forum where they can effectively vindicate their rights is problematic. As the *Concepcion* dissenters emphasized, no rational lawyer will represent a consumer for the possibility of fees stemming from a $30.22 claim.[211] The dissenters, quoting a Seventh Circuit decision, said,

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210. Three major cell phone providers currently maintain a small-claims court carve out and include a severability clause that would send a class action to court, rather than arbitration, if a court holds the class waiver unenforceable. *Sprint Terms*, *supra* note 20; *T-Mobile Terms*, *supra* note 20; *Verizon Agreement*, *supra* note 20.

211. *Concepcion*, 131 S. Ct. at 1761 (Breyer, J., dissenting).

"'[t]he *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30.'"[212] To the extent that the opponents of arbitration are winning the public relations war (and, at this point, winning the policy war against arbitration through the creation of a federal agency that may eliminate arbitration in the consumer financial services industry), this may be an opportune time to reform arbitration in a way that preserves the benefits of arbitration generally, while, at the same time, ensures that litigants are provided an opportunity to have their claims heard in some forum. Arbitration fairness should not mean the elimination of arbitration as a dispute resolution mechanism. Instead, arbitration reform should focus on enabling consumers to vindicate their rights, whether in individual or class settings.

212. *Id.* (quoting Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004)).